

ESSAY

THE PRINCIPLES OF '98: AN ESSAY IN HISTORICAL RETRIEVAL

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PROLOGUE

Jonathan Elliot holds a secure place in the footnotes of American constitutional history. "Elliot's *Debates*"¹ were, from their publication until just a few years ago, the primary source for information about the debates over the Constitution conducted in the state ratifying conventions. Elliot was not, however, simply an assiduous gatherer of historical information about the Constitution: he was an active participant (on the states' rights side) in the constitutional debates of his day, and particularly in the great nullification crisis of 1828-1833.²

Two years after completing his *Debates*, Elliot published another piece of constitutional historiography, a book collecting discussions of federalism and states' rights. The book's title described its contents: *The Virginia and Kentucky Resolutions of 1798 and '99; with Jefferson's Original Draught Thereof. Also, Madison's Report, Calhoun's Address, Resolutions of the Several States in Relation to State*

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¹ 1-4 The Debates, Resolutions, and other Proceedings, in Convention, on the Adoption of the Federal Constitution (Jonathan Elliot ed., Washington, D.C., published by the editor 1827-30). Elliot's work has now been rendered almost obsolete by the ongoing publication of *The Documentary History of the Ratification of the Constitution* (Merrill Jensen ed., 1976).

² The extent to which Elliot's constitutional partisanship affected his scholarly labors in compiling and editing the *Debates* remains an open question. See James Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex. L. Rev.* 1, 13-24 (1986) (documenting Elliot's partisanship and his haphazard recording of the individual debates).

*Rights. With Other Documents in Support of the Jeffersonian Doctrines of '98.*³ The flamboyant typography and layout of the title page⁴ reinforced the message of the title: that the heart of American constitutionalism is federalism—"State Rights"—and identified what Elliot viewed as the most important statement of constitutional federalism—"the Jeffersonian Doctrines of '98."

Elliot's *Resolutions* included or excerpted a variety of documents supporting the states' rights position generally. Only a few of Elliot's selections directly addressed the specific constitutional question that sparked the nullification crisis: the debate over Congress's power to enact a protective tariff.⁵ Elliot made great use of the state legislative resolution, that favorite genre of the states' rights constitutionalist. He also mined judicial opinions, private letters, John C. Calhoun's public statements, and even a speech delivered in Congress in 1800 by Representative John Marshall for arguments supporting the states' rights vision of the Constitution. But the heart of Elliot's *Resolutions*, indeed the primary purpose of the enterprise as Elliot conceived it, was to republish, for a new generation and a new crisis, the original sources of Republican constitutionalism: the Virginia and Kentucky Resolutions of 1798 and 1799,⁶ and the Virginia Report of 1800.⁷

The Virginia and Kentucky Resolutions and the Virginia Report of 1800 ("Madison's Report," as Elliot called it) were the products of a specific constitutional dispute: the debate over the Alien and

³ The Virginia and Kentucky Resolutions of 1798 and '99; with Jefferson's Original Draught Thereof. Also, Madison's Report, Calhoun's Address, Resolutions of the Several States in Relation to State Rights. With Other Documents in Support of the Jeffersonian Doctrines of '98 (Jonathan Elliot ed., Washington, D.C., published by the editor 1832) [hereinafter *Resolutions*].

⁴ The title page is reproduced infra page 691.

⁵ Elliot printed paragraphs from Benjamin Franklin and William Channing on the value of free trade. *Resolutions*, supra note 3, at 73-74.

⁶ These are the Virginia Resolutions (Dec. 21, 1798) [hereinafter *Va. Res.*], reprinted in 17 *The Papers of James Madison* 185, 188 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan H. Perdue eds., 1991); Kentucky Resolutions (Nov. 16, 1798) [hereinafter *Ky. Res. 1798*], reprinted in H. Jefferson Powell, *Languages of Power: A Sourcebook of Early American Constitutional History* 130 (1991); Kentucky Resolutions of 1799 (Nov. 22, 1799) [hereinafter *Ky. Res. 1799*], reprinted in Powell, supra, at 138.

⁷ The Report of 1800 (Jan. 7, 1800) [hereinafter *Rep. 1800*], reprinted in 17 *The Papers of James Madison*, supra note 6, at 303, 307. The report went by various names in the early nineteenth century, including Madison's Report, the Virginia Report, the Report of 1799, and the Report of 1800. It will be referred to as the Virginia Report of 1800 in this Essay.

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"LIBERTY—THE CONSTITUTION—UNION."

PUBLISHED BY JONATHAN ELLIOT.

Washington:
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Sedition Acts that a Federalist Congress enacted in mid-1798.⁸ The Federalists claimed that the Acts were necessary and proper because the constitutional order was threatened externally by Revolutionary French aggression and internally by Republican criticism of the government.

The Republicans' intellectual leaders, Thomas Jefferson and James Madison, responded by anonymously drafting resolutions that were adopted by the legislatures of Kentucky and Virginia, respectively. The Resolutions were in part a restatement of the narrow construction approach to the interpretation of Congress' powers around which the Republican party initially coalesced. Yet Jefferson and Madison went on to explain and justify their narrow construction views on the basis of a full-fledged theory of the Constitution's origins, nature, and purpose. The Resolutions proclaimed that the Constitution was a compact between the sovereign states as high contracting parties; the obligation to give a narrow construction to the powers delegated to the "general government" as the states' common agent flowed directly from the constitutional fact of the states' undiminished sovereignty.⁹

For Elliot, the Resolutions were not just a partisan platform, nor did they represent one constitutional theory among many. They provided, rather, the very basis of the constitutional order of the early nineteenth century; they were the canonical statement of the Constitution's true meaning and interpretation that the people had endorsed by electing Jefferson and a Republican congressional majority in 1800. In the preface to his *Resolutions*, Elliot described the "Jeffersonian Doctrines" and the Republican political victory in terms that seem bizarre from the standpoint of the late twentieth century:

These documents embody the principles of the old Republicans of the Jeffersonian school, the genuine disciples of the Whigs of '76. They were promulgated at a time when the encroachments of the Federal Government on the rights "reserved to the States and to the People," threatened to break down all the landmarks of the constitution, and to destroy the liberties of the country. These principles fearlessly advanced and nobly maintained by Thomas

⁸ These were the Alien Act, ch. 58, 1 Stat. 570 (1798), and the Sedition Act, ch. 74, 1 Stat. 596 (1798).

⁹ See Ky. Res. 1798, *supra* note 6, at 130; Va. Res., *supra* note 6, at 189.

Jefferson and his compatriots during “the reign of terror,” effected a political revolution which restored the public liberty—in the emphatic language of Mr[.] Jefferson, “saved the constitution even at its last gasp”—and thereby preserved the Union itself, bringing back, at the same time, the administration of the Government, to the purity and simplicity from which it had so widely departed.¹⁰

For a contemporaneous reader, Elliot’s preface wove a recognizable and complex web of theme and allusion. The language of “Whiggery” evoked a rich, highly mythologized account of Anglo-American history. This history recounted that after the displacement of Saxon freedom by the Norman Yoke following 1066, English-speaking Whigs had fought a centuries-long struggle to regain and defend liberty from royal tyranny. In this account, Lord Coke’s judicial battles against the prerogative courts, the English Civil War and the Glorious Revolution of 1688, and the “Country” opposition to Robert Walpole’s “Court” ministry were all episodes in a continuous effort to preserve freedom that had reached its eighteenth-century high point in the American Revolution.¹¹

Thus, by outlining a sort of apostolic succession for Jeffersonian federalism—from “the Whigs of ’76” to their “genuine disciples,” the “old Republicans”—Elliot linked the particular and highly contested constitutional positions he advocated to an account of history that most Americans accepted as determinative of their own political values. By invoking Jefferson’s description of the Alien and Sedition Acts as instituting a “reign of terror,” Elliot neatly undercut the standard nationalist use of the Whig history, which ascribed the defense of rational liberty to the Federalists and cast Jefferson and his allies in the role of Jacobin terrorists.

Elliot’s portrayal of the events from which the Virginia and Kentucky Resolutions had emerged was equally artful. The Federalists, Elliot implied, had then shown themselves to be the heirs of the “Court” tyrants who in past ages had attempted to “destroy the liberties” of the “Country.”¹² Just as with past attempts to subvert the English Constitution, the patriotic response necessarily took

¹⁰ Resolutions, *supra* note 3, at 2.

¹¹ See Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* 21-69 (1978).

¹² See Resolutions, *supra* note 3, at 2. The Biblical allusion to “landmarks” suggested a link or analogy to the even older oppressors excoriated in Scripture.

the form of "revolution" (which in 1800, unlike 1776, was a political revolution rather than a military one) aimed at eliminating corruption and restoring "purity and simplicity" in the administration of public affairs.¹³

Elliot subtly indicated that after the revolution of 1800 not all Republicans had remained true. Elliot's purpose was to describe "the principles of the *old* Republicans," the "*genuine*" proponents of the Republican creed.¹⁴ That creed, finally, had a clear implication for the nullification crisis of Elliot's own day. The Republican defenders of states' rights, not the advocates of unchecked national power, had acted to "preserv[e] the Union"¹⁵ in 1798-1800. In sum, the constitutional principle of union was not identical to a zeal for centralized government, but rather its antithesis.

Elliot's view of the significance of the principles of '98, and his location of those principles within a broader history of the struggle between liberty and tyranny, were widely shared in the early nineteenth century. Antebellum defenders of states' rights invariably treated the Virginia and Kentucky Resolutions as the standard of constitutional truth. Jefferson himself asserted that "the revolution of 1800 . . . was as real a revolution in the principles of our government as that of 1776 was in its form The nation declared its will by dismissing functionaries of one principle and electing those of another."¹⁶ The principles of '98, according to the great Virginia judge Spencer Roane, "had a principal influence in producing a new era in the American republic."¹⁷ Roane described the Virginia

¹³ See *id.*

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.*

¹⁶ Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in *The Writings of Thomas Jefferson* 151, 152 (Edward Dumbauld ed., 1955). At other times, most famously in his first inaugural address, Jefferson downplayed the divide between his constitutional views and those of the defeated Federalists: "[E]very difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all republicans; we are all federalists." Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), in *The Writings of Thomas Jefferson*, *supra*, at 41, 42.

¹⁷ *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 29 (1815), *rev'd sub nom. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Roane's cousin Thomas Ritchie, the enormously influential editor of the *Richmond Enquirer*, described Madison's Virginia Report of 1800, Rep. 1800, *supra* note 7, at 303, and Edmund Pendleton's 1801 newspaper essay "The Danger Not Over," Edmond [sic] Pendleton, *The Danger Not Over*, *Richmond Enquirer*, Oct. 20, 1801, *reprinted in* 2 *The Letters and Papers of Edmund Pendleton, 1734-1803*, at

Report of 1800—the most elaborate presentation of the Republican interpretation of the Constitution—as “the *Magna Charta* on which the republicans settled down, after the great struggle in the year 1799. Its principles have only *been departed* from since . . . by turn-coats and apostates.”¹⁸

Republican defenders of state-oriented interpretations of the Constitution were not alone in canonizing the principles of '98. Within a few years of the election of 1800 the language and the concepts of the Resolutions and the Report were a sort of constitutional *lingua franca*, as likely to be used by northern Federalists as by southern Republicans. In 1799, for example, the Federalist legislature of Rhode Island sternly denounced the Virginia Resolutions as an “infracture of the Constitution of the United States, expressed in plain terms.”¹⁹ A decade later the same legislature, still Federalist, adopted the language and theme of the Virginia Resolutions in announcing that the people of Rhode Island had a right to interpose, a right grounded in Rhode Island's status “as one of the parties to the Federal compact.”²⁰ The (in)famous Hartford Convention of January 1815, which proposed constitutional amendments to protect Northeastern interests against federal oppression, acted in strict accord with the notion of state interpre-

695 (David J. Mays ed., 1967), as “the Old and the New Testaments” of his political Bible. Charles H. Ambler, Thomas Ritchie: A Study in Virginia Politics 23 (1913).

¹⁸ Spencer Roane, Hampden I, Richmond Enquirer, June 11, 1819, *reprinted in* John Marshall's Defense of *McCulloch v. Maryland* 106, 113 (Gerald Gunther ed., 1969) (footnote omitted). Roane's essay contained a footnote at this point stating that the accusation of apostasy “applies, of course, only to republicans.” *Id.* at 113 n.18. Not all Republicans believed that the authors of the principles of '98 had themselves remained faithful. John Randolph of Roanoke, the bitterly sarcastic censor of Republican orthodoxy in the first decades of the century, criticized the first three Republican presidents for their failure to adhere in practice to the principles of '98. He wrote:

Mr. J[efferson] himself did much to impair the principles upon which he was brought into power, but his successor [Madison] gave them the coup de grace. The recommendation of the Bank of the U.S. alone was a renunciation of the heresies of his “Report” and a reconciliation with the holy catholic church of Expediency and Existing Circumstances. The present incumbent [Monroe] came in upon no principles, and as he brought none with him, so he will carry none away with him. Letter from John Randolph to Francis W. Gilmer (July 22, 1821), *in* Richard B. Davis, Francis Walker Gilmer: Life and Learning in Jefferson's Virginia 385, 385-86 (1939).

¹⁹ Rhode Island Gen. Assembly, Resolutions (Feb. 1799), *reprinted in* State Documents on Federal Relations 17, 17 (Herman V. Ames ed., 1970) [hereinafter State Documents].

²⁰ Rhode Island Gen. Assembly, Reports and Resolutions of Rhode Island on the Embargo (Mar. 4, 1809), *reprinted in* State Documents, *supra* note 19, at 42, 43-44.

tation in the Virginia Report of 1800, although the convention's Federalist membership disdained to mention their Virginia and Kentucky precedents.²¹

Henry Clay, one of the greatest nationalists of Elliot's generation, provided a striking example of the extent to which official allegiance to the "Jeffersonian Doctrines" was a test of Republicanism in the early nineteenth century. Clay professed adherence to the principles of '98 throughout his career. In an 1818 speech in the U.S. House of Representatives, for example, Clay stated that it was from the Virginia Report of 1800 and other similar papers that he had formed his political theories of the Constitution.²² Many years later Clay, campaigning now as a member of the Whig opposition to the Democratic Party of Andrew Jackson, stated the constitutional views of the generally nationalist Whigs in terms of loyalty to the principles of '98: "The Whigs of 1840 stand where the Republicans of 1798 stood, and where the Whigs of the Revolution were, battling for liberty, for the people, for free institutions, against power, against corruption, against executive encroachments, against monarchy."²³ The principles of '98, which Jonathan Elliot saw as the oracle of states' rights, were for Henry Clay the foundation of a libertarian nationalism.²⁴

* * *

Constitutional lawyers and theorists of the 1990s only dimly remember the events and words of the late 1790s that Elliot thought so crucial to a correct understanding of the American constitutional system. They are, furthermore, unlikely to perceive the state compact theory of the Virginia and Kentucky Resolutions as

²¹ See Report and Resolutions of the Hartford Convention (1815), *reprinted in* Theodore Dwight, *History of the Hartford Convention: With a Review of the Policy of the United States Government Which Led to the War of 1812*, at 352, 352-79 (Da Capo Press 1970) (1833).

²² See Henry Clay, Speech to the U.S. House of Representatives (March 7, 1818), *in* 2 *The Papers of Henry Clay* 448, 448 (James F. Hopkins ed., 1961).

²³ Henry Clay, Campaign Address in Hanover County, Virginia (June 27, 1840) (campaigning for the Whig's presidential candidate, William Henry Harrison, against the incumbent, Martin Van Buren, who was Jackson's successor), *in* 6 *The Annals of America* 565, 568 (1968).

²⁴ On Clay's politics, see Daniel Walker Howe, *The Political Culture of the American Whigs* 123-49 (1979).

"the true principles of the constitution."²⁵ What was for Elliot and many of his contemporaries the very heart of American constitutionalism has become a long-dead and (since its artificial revival by the opposition to *Brown v. Board of Education*²⁶) essentially discredited ideology.²⁷ Republican constitutionalism is, however, of continuing significance. In Part I, therefore, this Essay attempts to retrieve the fundamental themes of that constitutionalism. In addition, both for intrinsic reasons (which Part I will make clear) and because of the stature of its creators, Republican thought is a source of constitutional insight.²⁸ Part II, in a speculative mode, explores the relevance of Republican thought for contemporary constitutional practice.

²⁵ Resolutions, *supra* note 3, at 2.

²⁶ 347 U.S. 483 (1954).

²⁷ The recent interest in "civic republican" interpretations of the founding and the federal Constitution has not appreciably changed this fact. Although the connection between the Jeffersonians and earlier republican and "Country" traditions is clear, see, e.g., Banning, *supra* note 11, civic republican theorists have as yet shown little interest in the Jeffersonians, see, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1558-63 (1988) (discussing "the importance of Madison for current constitutional controversy" without even mentioning Madison's extensive constitutional writings in the 1791-1800 period). The civic republican theorists, furthermore, seem interested in early American "republicanism" chiefly because of their belief in its contemporary usefulness; unsurprisingly, but ahistorically, the advocates of "republican revival" tend to be interested only in the congenial aspects of the tradition. See Linda K. Kerber, *Making Republicanism Useful*, 97 *Yale L.J.* 1663 (1988). The line of descent from 1798 to the Confederacy and from there to the "massive resistance" to *Brown* no doubt makes Jeffersonian thought appear profoundly useless. In this Essay, all references to "Republican(ism)" are to the Jeffersonian Republicans.

²⁸ The obvious reason to doubt Republicanism's relevance is the role the principles of '98 subsequently played in the defense of slavery and, later, of segregation. While that subsequent history is certainly important, the pernicious use of Republican constitutionalism does not seem to me a ground on which automatically to dismiss its relevance any more than the pernicious use of nationalist reasoning to justify the Fugitive Slave Act is a *per se* reason to reject nationalism. Late in life, Madison noted and expressed his abhorrence of apologists for slavery asserting a claim to the legacy of '98. See James Madison, *Notes on Nullification* (1835-36), *reprinted in The Mind of the Founder: Sources of the Political Thought of James Madison* 417, 428 n.3 (Marvin Meyers ed., rev. ed. 1981) [hereinafter *The Mind of the Founder*].

I. THE PRINCIPLES OF '98: A HISTORICAL RECONSTRUCTION

A. *The Political Background*

Debate over the interpretation of the Constitution predates its adoption. The ratification debates were, in large measure, debates over how the Constitution would be and should be interpreted if it were to become supreme law. For a variety of reasons—fear of central government, parochial loyalties, skepticism about the survival of civic virtue in an extended republic—the Anti-Federalists attacked the Constitution as proposing a wholesale annihilation of federalism and the “consolidation” of the states into a unitary national polity. The supporters of ratification insisted in response that the Constitution’s text clearly established a strong but limited government. In *The Federalist* Number 45, for example, Madison assured readers that “[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”²⁹ Construed “with accuracy and candour,” Madison concluded, the Constitution was little more than an “invigoration” of Congress’s undeniably limited powers under the Articles of Confederation; it certainly was not a “consolidation” of the states.³⁰

The great Anti-Federalist “Brutus” rejected such reasoning as disingenuous. The reality, he contended, was that a good faith interpretation of the Constitution in accordance with the usual rules of construction³¹ would license unlimited national power:

It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution. The great objects [of the Constitution] then are declared in this preamble in general and indefinite terms to be to provide for the common defence . . . [and] general welfare The inference is natural that the legislature will have an authority to make all laws which they shall judge necessary for the common

²⁹ *The Federalist* No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

³⁰ *Id.* at 314.

³¹ Most proponents of ratification accepted the propriety of interpreting the Constitution using the familiar rules of construction of the common law. See, e.g., *The Federalist* Nos. 78, 83, at 525-26, 559 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (discussing application of rules of construction to the Constitution).

safety, and to promote the general welfare. This amounts to a power to make laws at discretion.³²

The power of the federal judiciary to interpret the Constitution authoritatively, "Brutus" warned, would simply legitimate the Constitution's "tendency" toward "an entire subversion of the legislative, executive and judicial powers of the individual states" because "[t]he constitution itself strongly countenances such a mode of construction."³³

Ratification did not eliminate concerns about federal power held by the Constitution's opponents, and those concerns fueled early disagreement over constitutional interpretation. In the 1789 debate in the First Congress over according the President unilateral power to remove federal officers, critics of the proposal to recognize such a power attacked it as contrary to the proper interpretation of the Constitution's text. Senator William Grayson described the proposal in the same terms he and other Anti-Federalists had applied to the Constitution itself the year before as an "endeavor to increase the consolidatory powers."³⁴ The Anti-Federalists thus almost effortlessly converted their themes of consolidation and federal overreaching from arguments against ratifying the Constitution to arguments about its true meaning.

Alexander Hamilton's proposal that Congress charter a national bank marked a crucial turning point in the development of early constitutional thought, for in the subsequent debate over the bank bill's constitutionality, the coalition that had successfully argued for ratification fell apart permanently. The chief opponent of Hamilton's bill in Congress was his old ally and *Federalist* co-author, Madison. President Washington's solicitation of opinion from his cabinet pitted Secretary of the Treasury Hamilton against Attorney General Edmund Randolph (a Philadelphia Framer and, ultimately, a supporter of ratification) and Secretary of State Jefferson (whose qualified support for the Constitution was influential in the

³² Essays of Brutus V, N.Y. Journal, Dec. 13, 1789, reprinted in 2 The Complete Anti-Federalist 388, 388-89 (Herbert J. Storing ed., 1981).

³³ Essays of Brutus XI, N.Y. Journal, Jan. 31, 1788 [hereinafter Brutus XI], reprinted in 2 The Complete Anti-Federalist, supra note 32, at 417, 420-21.

³⁴ John Adams, Notes of a Debate in the Senate (July 15, 1789), in 4 The Founders' Constitution 105, 106 (Philip B. Kurland & Ralph Lerner eds., 1987).

crucial Virginia convention).³⁵ Madison, Randolph, and Jefferson all attacked the bill as outside Congress' textually enumerated powers, while Hamilton and other defenders of the bill justified it by arguing that the Constitution was intended to permit "a liberal latitude to the exercise of the specified powers."³⁶

Soon after their defeat over the bank bill, Madison, Jefferson, and other opponents of Hamilton and of an energetic federal government found themselves at the head of a political opposition. This political development posed a serious intellectual and moral problem. Even more than the Anti-Federalists such as Grayson, old Federalists such as Madison needed to demonstrate—and no doubt to explain to themselves—that their opposition to Hamiltonian nationalism was consistent with their earlier support for ratification.³⁷ Perhaps even more fundamentally, the opposi-

³⁵ In the 1790s, the publicly available sources of the constitutional arguments over the bank bill were the speeches in Congress and Hamilton's various reports published before and after the bill's enactment. The existence of disagreement in Washington's cabinet, and of Jefferson's objections to the bill, was widely known (at least in gentry circles), although Washington kept private the actual cabinet opinions. See Letter from Alexander Hamilton to Edward Carrington (May 26, 1792), in 11 *The Papers of Alexander Hamilton* 426, 429-30 (Harold C. Syrett ed., 1966) (discussing Jefferson's general disagreement with the bank bill and with Madison's principles of government); Dumas Malone, *Jefferson and His Time* 348 (1951). The first published discussion of the opinions, to my knowledge, was in John Marshall, 5 *Life of George Washington* note V, app. at 13-14 (Philadelphia, C.P. Wayne 1807). By 1811, when Congress debated the renewal of the bank's charter, the details and the texts of the debate within the cabinet were publicly available. See, e.g., 22 *Annals of Cong.* 627, 630 (1853) (statement of Rep. Peter B. Porter, Jan. 18, 1811) (stating that a pamphlet containing "the celebrated argument of General Hamilton" has "been printed and distributed among the members"); id. at 676, 678 (statement of Rep. Robert Wright, Jan. 18, 1811) (discussing Jefferson's opinion regarding the bank).

Randolph in fact actually submitted *two* opinions to Washington, one his formal "opinion of counsel" and the other discussing various supplementary matters. Randolph's opinions were not included in the reports of the Opinions of the Attorneys General that were published beginning in 1852, see 1 *Op. Att'y Gen.* (1852), and played no significant role in the development of Republican constitutionalism. They are nevertheless extremely interesting in their own right as examples of early constitutional-law reasoning. See Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions* (unpublished manuscript on file with Virginia Law Review) (providing a modern edition of Randolph's opinions).

³⁶ Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in 8 *The Papers of Alexander Hamilton* 97, 103 (Harold C. Syrett ed., 1965).

³⁷ Deep-rooted concerns about the maintenance of personal character in public life made it very difficult for late eighteenth century American gentlemen to concede even the appearance, and still less the reality, of political inconsistency. Robert H. Wiebe has

tion needed to distinguish itself from a “faction,” for late eighteenth-century American society (like its English parent) almost uniformly disapproved of overtly partisan politics.³⁸

Madison addressed the problem of legitimizing the existence of the nascent “Republican” party in a series of newspaper essays published in 1792 in the *National Gazette*, a journal established under Jefferson’s patronage to provide a vehicle for the expression of opposition viewpoints.³⁹ In an essay entitled “A Candid State of Parties,” Madison attempted to explain both the rise of political opposition and the nonfactional nature of the opposition. He claimed that the Federalist/Anti-Federalist “state of parties” that prevailed during the ratification period had given way to a different “division” of the people that, “being natural to most political societies, is likely to be of some duration in ours.”⁴⁰ Madison’s analysis of this new political landscape drew on older “Country” themes.⁴¹

Madison continued by describing the “anti-republican party, as it may be called,” as an American incarnation of the “Court” party of eighteenth century English politics. Labeling the “anti-republicans” the friends of aristocratic pretension—he wrote that they were “more partial to the opulent than to the other classes of society”—Madison accused his opponents of believing that “government can be carried on only by the pageantry of rank, the influence of money and emoluments, and the terror of military force.” The

brilliantly portrayed the interaction between constitutional opinion and what he calls “the politics of power” during the Founders’ generation. See Robert H. Wiebe, *The Opening of American Society* (1984). “Below the president [Washington] the rest of the gentlemen studied one another’s behavior and probed one another’s intentions to the mutual ends of gauging their colleagues’ characters and preserving their own.” *Id.* at 44.

³⁸ Professor Ralph Ketcham has succinctly described the views of that paradigmatic American patriot George Washington:

The greatest evil of faction and party was not its effect on public policy (though that was bad enough), but rather its narrowing and degradation of political motives, long regarded as the essence of corruption. Parties riveted public attention on partialities and self-interest, and the effect was nothing less than enslavement of the nation to sin and vice.

Ralph Ketcham, *Presidents Above Party* 93 (1984).

³⁹ See Malone, *supra* note 35, at 420-28.

⁴⁰ James Madison, *A Candid State of Parties*, *Nat’l Gazette*, Sept. 22, 1792, *reprinted in* 14 *The Papers of James Madison* 370, 371 (Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Jeanne K. Sisson & Fredrika J. Teute eds., 1983).

⁴¹ See *supra* text accompanying notes 11-12 (discussing “Country” themes).

ultimate "anti-republican" goal, Madison suggested, was to aristocratize "the government itself . . . by degrees."⁴²

"The Republican party," in contrast, was scarcely a "faction" at all as Madison described it. Consisting of "the mass of people in every part of the union, in every state, and of every occupation," the Republicans were united in their belief that "mankind are capable of governing themselves" and their demand that "the Government be administered in the spirit and form approved by the great body of the people."⁴³ Republican opposition to the exercise of expansive federal power in measures such as the bank bill was, Madison appeared to contend, the form that the age-old struggle against tyranny necessarily took in a republic with a written charter.

Madison explained further in another newspaper essay significantly entitled "Consolidation." He argued that if Congress' powers and responsibilities were expanded beyond the limits of the text into the areas of state competence, the "incompetency of one Legislature to regulate all the various objects belonging to the local governments, would evidently force a transfer of many of them to the Executive department." In turn, the resulting growth in the "splendour and number of its prerogatives" would gradually transform the presidency into a monarchy.⁴⁴ Madison perceived the route—from Hamiltonian "liberal" construction of the Constitution, to the "consolidation" of the states into a single omniscient national government, and finally to the death of republicanism itself—to be a smooth and dangerously easy one.

Despite the Republican party's diverse political roots,⁴⁵ it coalesced as the vehicle of opposition politics during the 1790s and enjoyed a considerable degree of agreement on constitutional matters. In a long series of disputes over the constitutionality of congressional legislation and presidential actions, Republican spokesmen repeatedly insisted on a stringently textual approach to constitutional interpretation. Republican textual exegesis usually led to narrow constructions of congressional authority in areas of

⁴² Madison, *supra* note 40, at 371.

⁴³ *Id.* at 371-72.

⁴⁴ James Madison, *Consolidation*, *Nat'l Gazette*, Dec. 5, 1791, *reprinted in* 14 *The Papers of James Madison*, *supra* note 40, at 137, 138.

⁴⁵ See Banning, *supra* note 11, at 161-207.

state interest and to expansive views of the powers and prerogatives of the House of Representatives as against the President.⁴⁶

Having seen the origins of Republican thought, we turn now to the catalyst for the final step in the development of the principles of '98. This catalyst was supplied not by internal constitutional concerns but by an international crisis: the deterioration of relations between the United States and Revolutionary France.

B. The Crisis of 1798-1800

Throughout the first two years of John Adams' presidency, Franco-American relations steadily worsened. Fueled on one side by French anger over the American refusal to support a former ally and fellow republic in its lonely struggle against the European powers, and on the other side by American anger over French demands and French commerce raiding, the slide toward overt hostility accelerated after negotiations between the countries broke down altogether in March 1798.⁴⁷

Thus, to Americans with a progovernment perspective, continued Republican opposition to vigorous federal government began to appear not just factional but treasonous. This impression was further reinforced for many Federalists by the francophile sympathies of many Republican leaders and by the Republican cultivation of support among working class Americans and foreign immigrants. In this crisis-laden atmosphere, the Federalist major-

⁴⁶ During the Virginia legislature's debate over the Virginia Resolutions, state Delegate Wilson C. Nicholas summarized the Republican view of the federal government's actions over the past decade:

Mr. Nicholas said, it was with the deepest regret that he reviewed the principal measures of the Federal Government, as they appeared to him to tend directly to a consolidation of the state governments, which he believed would eventuate in monarchy. Upon all questions about the division of power, everything had been given to the executive from Congress, everything to Congress from the states.

Delegate Wilson C. Nicholas, Debate before the Virginia House of Delegates (Dec. 21, 1798), in *The Virginia Report of 1799-1800, Touching the Alien and Sedition Laws; Together with the Virginia Resolutions of December 21, 1798, The Debate and Proceedings Thereon in the House of Delegates of Virginia, and Several Other Documents Illustrative of the Report and Resolutions 122, 151* (Da Capo Press 1970) (1850) [hereinafter *Va. Report*]; see also Banning, *supra* note 11, at 208-45 (explaining Republicanism as an adaptation of English opposition thought to 1790s American political issues); Jerald A. Combs, *The Jay Treaty 159-88* (1970) (describing the Republican reaction to the Jay Treaty and efforts for its ratification).

⁴⁷ See Banning, *supra* note 11, at 246-54.

ity in Congress enacted a series of statutes, known collectively as the Alien and Sedition Acts.⁴⁸ These Acts were intended to enhance the federal government's ability to defend the republic from external threat and internal subversion. The Alien Act empowered the President to deport "such *aliens* as he shall judge dangerous to the peace and safety of the United States."⁴⁹ The Sedition Act made it a criminal offense to publish libels against "the government of the United States," Congress, or the President⁵⁰ with the intent to "bring them . . . into contempt or disrepute," a standard clearly broad enough to encompass almost any criticism of the government that a jury might regard as "false, scandalous, and malicious."⁵¹ Even more than the Alien Act, the Sedition Act seemed to Republicans (and even some Federalists) a partisan measure.⁵²

⁴⁸ Congressional Republicans, and subsequently Jefferson and Madison, focused their constitutional criticisms on the Alien Act, ch. 58, 1 Stat. 570 (1798), and the Sedition Act, ch. 74, 1 Stat. 596 (1798).

⁴⁹ Alien Act, ch. 58, 1 Stat. at 571. Imprisonment was the sanction for disobeying a presidential deportation order. The Act provided for the presidential appointment of hearing officers before whom deportees might attempt to prove that they posed no danger to the United States; the standard of proof was "to the satisfaction of the President." *Id.* The Act also authorized the imprisonment of any deported alien who returned without the President's permission "so long as, in the opinion of the President, the public safety may require." *Id.* The final section of the Act provided for its expiration after two years. *Id.*

⁵⁰ Sedition Act, ch. 74, 1 Stat. at 596. The Act pointedly did not extend its protection against libel to the *Vice* President of the United States, who was of course Thomas Jefferson.

⁵¹ *Id.* The Act's proponents defended it in part on the (correct) ground that it was more protective of freedom of speech than the English law of seditious libel: § 3 of the Act guaranteed a defendant's right to present as a defense the truthfulness of the publication and the jury's "right to determine the law and the fact." *Id.* at 597. The majority view in England recognized neither right at common law. See Leonard W. Levy, *Emergence of a Free Press* (1985). The Act's expiration date, March 3, 1801, was the last day of Federalist President Adams' term of office, and thus insured that he and the Federalist majority in Congress would receive the Act's protections during the elections of 1800.

⁵² Hamilton, who supported strong federal measures against what he viewed as Virginia disunionism, expressed private concern about the Alien and Sedition Acts. When what became the Sedition Act was first introduced, Hamilton labelled it "highly exceptionable." See Letter from Alexander Hamilton to Oliver Wolcott, Jr. (June 29, 1798), in 21 *The Papers of Alexander Hamilton* 521, 522 (Harold C. Syrett ed., 1974). "Let us not establish a tyranny. Energy is a very different thing from violence." *Id.* After the Kentucky and Virginia legislatures adopted their 1798 resolutions, Hamilton urged his allies to defend "the constitutionality and expediency of those laws" publicly while leaving open the possibility of amending the Acts in order to "institut[e] better guards" for individual liberty. See Letter from Alexander Hamilton to Theodore Sedgwick (Feb. 2, 1799), in 22

In response to the failure of the congressional opposition to derail the Acts, Jefferson and Madison secretly drafted resolutions condemning the Acts. Jefferson's draft, with some alterations, was adopted by the Kentucky legislature on November 16, 1798, Madison's by the Virginia General Assembly on Christmas Eve the same year. The "Virginia and Kentucky Resolutions" were then circulated to the legislatures of the other states, where they met a chilly reception: no state endorsed the position of Virginia and Kentucky, and several Federalist legislatures adopted statements expressly condemning the Resolutions and endorsing the constitutionality of the Alien and Sedition Acts.⁵³ On November 22, 1799, Kentucky in turn adopted a shorter set of resolutions reaffirming its stance, and the Virginia legislature approved an elaborate report defending its Resolutions on January 8, 1800.⁵⁴ The Resolutions had thus failed in their immediate political purpose. With the subsequent electoral victory of the Republicans, however, they assumed an increasingly important role as the canonical statements of the Republicans' constitutional vision.

The Republican constitutionalism that Jefferson, Madison, and others⁵⁵ formulated during and immediately after the crisis of 1798-1800 was characterized by three fundamental themes. First, the

The Papers of Alexander Hamilton 452, 452-53 (Harold C. Syrett ed., 1975). "On a recent though hasty revision of the Alien law it seems to me deficient in precautions against abuse and for the security of Citizens. This should not be." *Id.*

⁵³ Elliot was intellectually honest enough to reprint these negative responses. See Resolutions, *supra* note 3, at 9-15.

⁵⁴ The author of the Kentucky Resolutions of 1799 is unknown; its substance and terminology were borrowed from Jefferson's draft of the 1798 Resolutions. Madison, who entered the Virginia legislature for the purpose of defending the Virginia Resolutions, wrote the Virginia Report of 1800 as chair of the committee appointed to study the responses to Virginia's 1798 action. Rep. 1800, *supra* note 7, at 303 (editorial note).

⁵⁵ Perhaps the best known contemporaneous presentation of Republican constitutionalism by another writer was Pennsylvania Chief Justice Thomas McKean's opinion in *Commonwealth v. Cobbett*, 3 Dall. 467 (Pa. 1798), which Elliot reprinted in Resolutions, *supra* note 3, at 71. The case involved a notorious Federalist journalist, William Cobbett, whose scurrilous attacks on Republican political figures eventually led to his prosecution for libel by Republican state officials, and Cobbett was compelled to enter into a recognizance guaranteeing his good behavior. When he resumed his publishing career without noticeable change in subject or tone, the state sought to recover on the recognizance, and Cobbett, an English subject, petitioned to remove his case to federal court pursuant to the Judiciary Act of 1789. McKean's opinion refusing to permit removal included an elaborate presentation of a compact theory of the Constitution similar to Jefferson's.

Republicans insisted that the appropriate approach to the interpreting the Constitution is textual. Constitutional discussion, they argued, involves the lawyer's construction of a written instrument, not the statesman's discussion of theory or policy. Second, free government rests on consent and is the product of compact. The Republicans therefore revitalized the concept of the federal Constitution as a compact between the states. They also identified, ambiguously, the "states" as the parties that had created, and thus ultimately control, the compact and its terms. Third, the Republicans followed older English "Country" writers in resting their constitutionalism on the premise that political power is a dangerous and corrupting force, whose possessors should be the objects of fear and suspicion, not trust. In the next Section of this Essay I discuss these themes.

C. The Basic Themes of the Principles of '98

1. The Constitution as Legal Text

The first of the central principles of '98 was the Republican stress on the fact that the Constitution is a legal instrument, and on the idea that legal construction is the appropriate mode of interpreting the Constitution's mandates. Both Madison and Jefferson emphasized the Constitution's textual nature during their attack on the constitutionality of Hamilton's bank bill. Madison outlined the anti-Hamiltonian position in a lengthy speech attacking the bank bill's constitutionality on February 2, 1791.⁵⁶ The primary theme of the speech was, according to a newspaper account, that the "essential characteristic of the [federal] government" was that it had only "limited and enumerated powers"⁵⁷—in other words, that national power stemmed entirely from the act of ratifying the written Constitution and that its authority was wholly defined by that instru-

⁵⁶ Gazette of the U.S., Feb. 23, 1791, reprinted in 13 The Papers of James Madison 372 (Charles F. Hobson, Robert A. Rutland, William M.E. Rachal & Jeanne K. Sisson eds., 1981) (reporting James Madison's speech on the bank bill). Republican opponents of renewing the bank's charter in 1811 often invoked Madison's speech, "that perspicuous and luminous argument that has been so justly celebrated as defining and marking out the proper limits of power assigned to the General Government." 22 Annals of Cong. 694, 696 (1853) (statement of Rep. William T. Barry, Jan. 18, 1811).

⁵⁷ Gazette of the U.S., supra note 56, at 376. Madison observed that proposed articles 11 and 12, which were the basis for the Tenth Amendment, provided a rule of construction that "exclud[ed] every source of power not within the constitution itself." *Id.* at 381.

ment's terms. Madison's speech emphasized that the Constitution "is not a general grant, out of which particular powers are excepted—it is a grant of particular powers only, leaving the general mass in other hands. So it had been understood by its friends and its foes, and so it was to be interpreted."⁵⁸ From this radically textual understanding of the constitutional enterprise,⁵⁹ Madison drew several corollaries of great significance. The most fundamental was that constitutional analysis was a matter of textual construction, and therefore should be guided by agreed-upon principles of construction. Early in his speech, Madison "laid down" a series of rules "[a]s preliminaries to a right interpretation."⁶⁰ The chief of these rules was, logically enough, a prohibition on interpretations that would undermine the textuality of constitutional debate and thus the very interpretive enterprise (as Madison understood it) itself.⁶¹ The other rules were versions of familiar common-law rules of construction, intended to direct the search for "the meaning of the parties to the instrument" along the lines of logic and "reasonable evidence."⁶²

The bank bill, in Madison's view, clearly lay outside Congress's textually defined powers when those powers were properly interpreted, which meant as enumerated and defined by the words of Article I, Section 8. Madison almost contemptuously dismissed any reliance on the taxing and borrowing powers, but his reasons for doing so concisely foreshadowed the underlying general structure of early Republican argument. His starting point was strictly textual: the bank bill neither laid taxes nor borrowed money in a literal sense and thus did not fall within the meaning of the clauses.⁶³ Madison's fundamental interpretive rule, furthermore,

⁵⁸ *Id.* at 374.

⁵⁹ Americans have become so accustomed to associating constitutional debate with discussions about the meaning of texts that it is easy to overlook the significance of Madison's textualism. English constitutional argument, with which the founding generation grew up, was not fundamentally textual, even though some texts (the Magna Charta, for example, and some of the American colonial charters) played significant roles. For a classic account, see, e.g., Bernard Bailyn, *The Ideological Origins of the American Revolution* 67-69 (1967).

⁶⁰ *Gazette of the U.S.*, *supra* note 56, at 374.

⁶¹ *Id.* ("An interpretation that destroys the very characteristic of the government cannot be just.").

⁶² *Id.*

⁶³ *Id.* at 375.

barred any attempt to justify the bank bill by reference to the language about "common Defense and general Welfare" in the first clause of Section 8:

The power as to these general purposes was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined. To understand these terms in any sense, that would justify the power in question, would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the state governments.⁶⁴

The obvious textual basis for the bank bill was the Necessary and Proper Clause,⁶⁵ which the Anti-Federalists had identified as one of the Constitution's most dangerous centralizing provisions.⁶⁶ Because the Clause appeared clearly to license the congressional exercise of powers *not* defined in the Constitution's text, it presented an interpretive problem for a textualist such as Madison. Accordingly, Madison devoted most of his speech against the bank bill to explaining why the clause did not authorize Congress' creation of a national bank. While Madison briefly presented plain-meaning and contemporaneous-exposition arguments for a narrow reading of the clause,⁶⁷ he clearly recognized that formal rules of textual construction would not establish his argument. Again, the crucial starting point of the interpretive enterprise was the principle that individual interpretations should undermine neither the textualism that gave meaning to the notion of interpretation, nor the definition and limitation of federal power that was the point of the text itself. "Whatever meaning this clause may have, none can

⁶⁴ Id. Madison supplemented his primary argument by an implicit invocation of the common-law rule that terms with an established or technical meaning were to be construed in accordance with that meaning. "These terms are copied from the articles of confederation; had it ever been pretended, that they were to be understood otherwise than as here explained?" Id. (referring to Articles of Confederation art. VIII).

⁶⁵ U.S. Const. art. I, § 8.

⁶⁶ "Brutus" warned that the Necessary and Proper Clause "leaves the legislature at liberty, to do every thing, which in their judgment is best." Brutus XI, *supra* note 33, at 421.

⁶⁷ Madison invoked "the natural and obvious force of the terms and the context" as well as the "sense [in which the clause] had been explained by the friends of the constitution, and ratified by the state conventions." *Gazette of the U.S.*, *supra* note 56, at 376.

be admitted, that would give an unlimited discretion to Congress.”⁶⁸

The reasoning necessary to justify the bank bill as the exercise of the “means of executing [one of the enumerated] powers” proved, Madison argued, that interpreting the Necessary and Proper Clause to authorize the bill would remove any limitation on congressional power, and thus eliminate the role of the text as the enumeration and definition of that power.⁶⁹

Mark the reasoning on which the validity of the bill depends. To borrow money is made the end and the accumulation of capitals, implied as the means. The accumulation of capitals is then the end, and a bank implied as the means. The bank is then the end, and a charter of incorporation, a monopoly, capital punishments, &c., implied as the means. If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.⁷⁰

The unavoidable consequence of a vigorous textualism of Madison’s sort is that the Constitution so understood is, at least potentially, imperfect.⁷¹ A Madisonian Constitution may fail to delegate power necessary for society’s safety and welfare or (although Madison did not expressly address this possibility in his bank speech) omit some restriction on power essential to liberty. However, for Madison, this was the unavoidable corollary of taking the Constitution seriously as a text in the first place. Unless Congress strove to “keep close to our chartered authorities”⁷² in legislation, its actions would amount to an implicit repudiation of the whole constitutional project of defining power by a written instrument. So to act, Madison hinted, would not only be unfaithful to the Constitution, but would also raise the “danger” of tyranny the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 377-78 (emphasis omitted). Madison made the same point with respect to attempting to invoke the taxing power as the ultimate source of the power to enact the bill. *Id.* at 377.

⁷¹ As Madison noted, “[i]t is not pretended that every insertion or omission in the Constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men.” *Id.* at 378.

⁷² *Id.* at 377.

Constitution was created to avoid.⁷³ Madison's interpretation of the federal Constitution involved the legal interpretation of a governing document, not a theoretical determination of what powers and limitations the federal government ought to possess.⁷⁴

The most insightful of the bank bill's defenders in the House of Representatives, Fisher Ames, was quick to identify the broader constitutional issues raised by Madison's speech against the bill. Ames flatly rejected Madison's central understanding of the Constitution as a set of discrete rules limiting Congress to those actions permitted by the legal interpretation of the text's meaning.

The Constitution contains the principles which are to govern in making laws; but every law requires an application of the rule to the case in question. We may err in applying it; but we are to exercise our judgments, and on every occasion to decide according to an honest conviction of its true meaning.⁷⁵

Legislative decisions about what power Congress may constitutionally wield in a given circumstance, according to Ames, involved the exercise of precisely those faculties of judgment about policy and expediency that Madison sought to exclude from constitutional discussion.

Ames rejected Madison's suggestion that strict textualism was necessary to avoid tyranny on the grounds that such a textualism was both impossible and unnecessary.⁷⁶ Madison's legalistic approach to constitutional interpretation did not and could not

⁷³ Id. at 377-79.

⁷⁴ In his speech,

[Madison] adverted to a distinction, which he said had not been sufficiently kept in view, between a power necessary and proper for the government or union and a power necessary and proper for executing the enumerated powers. In the latter case, the powers included in each of the enumerated powers were not expressed, but to be drawn from the nature of each. In the former, the powers composing the government were expressly enumerated. This constituted the peculiar nature of the government, no power therefore not enumerated could be inferred from the general nature of government. Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the constitution.

Id. at 379-80.

⁷⁵ Fisher Ames, Speech before the U.S. House of Representatives (Feb. 3, 1791), in 2 Works of Fisher Ames 851, 854 (W.B. Allen ed., 1983).

⁷⁶ As a pragmatic matter, Ames noted that the first Congress had "adopted it as a safe rule of action to legislate beyond the letter of the Constitution." Id. at 854. If Congress was mistaken in that judgment, "[a] great part of our two years labor is lost . . . for we have

eliminate constitutional disagreement: the elaborate rules of interpretation Madison and his allies invoked “will be found as obscure, and of course as formidable as that which they condemn; they only set up one construction against another.”⁷⁷ This did not mean, Ames insisted, that he and the other supporters of the bill were endorsing rule by the “arbitrary discretion” of Congress, but rather that constitutionalism protects liberty by shaping the forthright political discussion of society’s needs and individuals’ rights, and not by forcing high questions of governance into the narrow confines of lawyers’ arguments.⁷⁸ “That construction may be maintained to be a safe one which promotes the good of society, and the ends for which the government was adopted, without impairing the rights of any man, or the powers of any state.”⁷⁹

Ames’s criticisms of Madison went further. Ames claimed that Madison’s ostentatiously apolitical textualism in fact rested on a thoroughly political, and thoroughly contestable, opposition to national power.⁸⁰

The powers of Congress are disputed. We are obliged to decide the question according to truth. The negative, if false, is less safe than the affirmative, if true. Why, then, shall we be told that the negative is the safe side? Not exercising the powers we have, may be as pernicious as usurping those we have not.⁸¹

The antinational tilt to Madison’s constitutionalism, Ames asserted, could not be justified in Ames’s view by the “bugbear” of

scarcely made a law in which we have not exercised our discretion with regard to the true intent of the Constitution.” *Id.* at 853-54.

⁷⁷ *Id.* at 854.

⁷⁸ *Id.* at 853-56.

⁷⁹ *Id.* at 856. Despite his talk of “construction,” Ames’s understanding of constitutional thought clearly deemphasized the significance of the text. “Congress may do what is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves, or to the powers which are assigned to the states. This rule of interpretation seems to be safe, and not a very uncertain one, independently of the Constitution itself.” *Id.*

⁸⁰ At one point, Ames came very close to a (suitably genteel) accusation that Madison’s motives were partisan or parochial: “He [Ames] thought, therefore, that there was too much prepossession with some against the bank, and that the debate ought to be considered more impartially, as the negative was neither more safe, certain, nor conformable to our duty than the other side of the question.” *Id.* at 855.

⁸¹ *Id.* at 854-55.

equating implied powers with tyranny.⁸² Governmental incapacity could imperil the safety of society and its individual members as easily as governmental overreaching.⁸³ At this point, Ames had identified one of the central problems with Madisonian textualism, which is its unavoidable dependence on extratextual assumptions and principles. He did so, however, by revealing the chief conundrum of early nationalist constitutional thought—distinguishing constitutional argument as a form of autonomous, principled reasoning from the policy-driven debates and discretionary decisions of politicians.

The Republican state papers of 1798-1800 reiterated Madison's 1791 stress on the textuality of the Constitution.⁸⁴ During the debates in the Virginia House of Delegates over what became the Virginia Resolutions, William Branch Giles vigorously asserted the Republicans' basic constitutional creed:

[T]he powers of government [are] derived from the Constitution, and not from the reason and nature of things. Implication [of federal power], he said, was a dangerous doctrine. There was an express prohibition of all powers not granted by the Constitution. . . . The derivation of power, he again insisted, could not be proved otherwise than from the Constitution.⁸⁵

The Resolutions themselves criticized the actions of the federal government as manifesting a tendency "to enlarge its powers by forced constructions of the constitutional charter which defines them."⁸⁶ The proper response was to confine Congress to those powers authorized by "the grants enumerated in that compact" and "limited by the plain sense and intention of the instrument."⁸⁷ The Constitution, the Virginia Report of 1800 repeated, was the sole

⁸² *Id.* at 853.

⁸³ In a clear response to Madison's argument that even the most essential power could not be exercised without a direct textual warrant, Ames asked what would happen if the Constitution did not delegate the power to raise armies and the country were invaded: "[W]ould a decision in Congress against raising armies be safer than the affirmative? The blood of our citizens would be shed, and shed unavenged." *Id.* at 855.

⁸⁴ The Virginia Report of 1800 identified the enactment of the bank bill as the premier example before 1798 of the federal government attempting "to enlarge its powers by forced constructions of the Constitutional charter which defines them" *Rep.* 1800, *supra* note 7, at 312-13.

⁸⁵ *Va. Report*, *supra* note 46, at 147.

⁸⁶ *Va. Res.*, *supra* note 6, at 189.

⁸⁷ *Id.*

source of national power, and the federal government could act legitimately only if it could trace its actions to an appropriate textual authorization: "If the powers granted, be valid, it is solely because they are granted; and if the granted powers are valid, because granted, all other powers not granted, must not be valid."⁸⁸ The Report emphatically rejected the old Hamiltonian argument that Congress is sovereign as to the means of executing its enumerated powers as destructive of "the foundation of the constitution as a system of limited and specified powers."⁸⁹ Kentucky's 1798 Resolutions similarly described the written Constitution as "the measure of the powers of the general government."⁹⁰

The 1798 Resolutions and the Virginia Report of 1800 supported their claim that the Alien and Sedition Acts were unconstitutional with specific textual arguments. Jefferson, for example, reasoned that the provision of the Alien Act giving the President power to order the departure of "all such *aliens* as he shall judge dangerous"⁹¹ violated the Sixth Amendment because it authorized him to deport a person legally residing in the United States "on his own suspicion, without jury, without public trial, without confrontation of the witnesses against him, without having witnesses in his favor, without defense, without counsel," and Article III because it "transfer[ed] the power of judging" from the courts to the executive.⁹² Madison argued against the existence of a federal common

⁸⁸ Rep. 1800, *supra* note 7, at 309. In its specific consideration of the Sedition Act, the Report noted that because the federal government is "composed of powers specifically granted . . . the positive authority under which the sedition act could be passed must be produced by those who assert its constitutionality." *Id.* at 326.

⁸⁹ *Id.* at 333.

⁹⁰ Ky. Res. 1798, *supra* note 6, at 133. During the congressional debate over the Alien and Sedition Acts, Republican speakers frequently denounced the Federalists' justifications for the bills as utterly destructive of the written Constitution's limitations on federal power. Representative Robert Williams, for example, attacked the Federalist argument that the Alien Act was essential for the country's security:

It is not enough for gentlemen to say it is necessary to pass a law this or that way, without they can show Congress has the power to do it. It is not sufficient to say that the general welfare requires a thing to be done; because if it be a subject which belongs to the States, however necessary it may be to be done, Congress cannot do it.

5 *Annals of Cong.* 1973, 1995 (1851) (statement of Rep. Robert Williams, June 19, 1798).

⁹¹ Alien Act, ch. 58, 1 Stat. at 571.

⁹² Ky. Res. 1798, *supra* note 6, at 132.

law⁹³ because, among other reasons, Article III and the Supremacy Clause, neither of which mentions the common law, both "consist of an enumeration [of federal law], which was evidently meant to be precise and compleat."⁹⁴

Republican textualism was not, as its critics sometimes asserted, a mechanical literalism. Correct interpretation, the Republican constitutionalists uniformly insisted, required a correct understanding of the general principles of "free and responsible government"⁹⁵ that the Constitution was meant to express. Those principles were law, however, only so far as they were embodied in the constitutional text.⁹⁶ When the Virginia Report of 1800, for example, addressed the Federalist criticism that the Republicans would leave the federal government "destitute of every authority . . . for shielding itself against . . . libellous attacks," Madison first responded with policy arguments about the wisdom of denying the national government control over its critics.⁹⁷ But, he concluded, "the question does not turn either on the wisdom of the constitution, or on the policy which gave rise to its particular organization. It turns on the actual meaning of the instrument"⁹⁸

A rigorous textualism in constitutional argument was a central feature of the principles of '98. In a letter written in 1803, President Jefferson discussed his reluctance to justify the Louisiana Purchase by expansive interpretation of the federal treaty power.⁹⁹ He explained that his preferred course of action was to ask that the Purchase be ratified by constitutional amendment:

I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which

⁹³ This issue arose because some Federalists invoked the existence of a federal common law of crimes as the source of Congress' power to enact the Sedition Act and to explain why the Act did not violate the First Amendment.

⁹⁴ Rep. 1800, *supra* note 7, at 331.

⁹⁵ *Id.* at 344.

⁹⁶ In an opinion rejecting a formalistic literalism in constitutional interpretation, Republican jurist Spencer Roane described the "fundamental principles" of the Virginia Constitution as "those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate." *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 40 (Gen. Ct. 1793).

⁹⁷ Rep. 1800, *supra* note 7, at 340-41.

⁹⁸ *Id.* at 341.

⁹⁹ Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in *The Writings of Thomas Jefferson*, *supra* note 16, at 144, 144.

would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.¹⁰⁰

Jefferson's words were echoed repeatedly throughout the early nineteenth century, as text-centered constitutional interpretation gradually drove extratextual argument from constitutional discussion.¹⁰¹

2. *The Contractual Constitution*

Before the Constitution, there was the Revolution. The Kentucky Resolutions of 1798 therefore began by invoking the Revolutionary principle that "when tyranny is abroad 'submission is a crime.'"¹⁰² The "several states composing the United States," Jefferson wrote, "are not united on the principle of unlimited submission to their general government."¹⁰³ The Federalists defended the Alien and Sedition Acts with the argument that the statutes were enacted by the elected representatives of the people and signed into law by an executive indirectly chosen by the people. This argument, however, proved that the Federalists were advocates of the anti-Revolutionary, Tory tenet of passive submission to government,¹⁰⁴ even if the Federalists had renamed submission "confidence" in popular government.¹⁰⁵ "Let him say what the

¹⁰⁰ Id.

¹⁰¹ See Leslie Friedman Goldstein, In Defense of the Text: Democracy and Constitutional Theory 78-84 (1991).

¹⁰² See Bailyn, *supra* note 59, at 141 (quoting a 1766 pamphlet by Stephen Johnson).

¹⁰³ Ky. Res. 1798, *supra* note 6, at 130.

¹⁰⁴ English Tory thought in the late seventeenth century and early eighteenth century contended that the members of a political society were obliged in conscience to submit to the laws enacted by those in authority. In a sermon preached in 1700, for example, Archbishop John Sharp explained that "there is not a commonwealth in the world so free, but that these doctrines of non-resistance and passive obedience must for ever be taught there, as necessary even for the preservation of their liberties." J.P. Kenyon, *Revolution Principles: The Politics of Party 1689-1720*, at 89 (1977). English Whigs, and the American Whigs of the colonial resistance and the Revolution, rejected the doctrine of "submission" as the tool of would-be tyrants. See generally Bailyn, *supra* note 59, at 94-143 (discussing the "logic of rebellion" in American Whig thought).

¹⁰⁵ The Federalists, of course, denied that they subscribed to the "absurd and detestable doctrine" of "passive obedience and non-resistance to the higher powers." See Nathanael Emmons, *A Discourse Delivered on the National Fast* (Wrentham, Mass. 1799), *reprinted in* 2 *American Political Writing During the Founding Era 1760-1805*, at 1023, 1033 (Charles S. Hyneman & Donald S. Lutz eds., 1983). They tended to argue, however, that "[t]here is

government is, if it be not a tyranny, which the men of our choice have conferred on the President, and the President of our choice has assented to and accepted," Jefferson sarcastically asked the advocates of the Alien Act.¹⁰⁶

The opposite of submission to tyranny, in the common political discourse of late eighteenth-century America, was government by consent and compact.¹⁰⁷ Consent—in practice the voluntary and popular creation of the civil order—was the logical foundation of a free republic, and adherence by the governed and the governors to the terms of the compact thereby created was the means by which freedom was maintained. A 1786 essay expressed the general view:

[I]n order to the forming and establishing of any government, it is necessary for individuals to give up, by a civil compact, some of their natural rights, for securing to themselves others which they would retain. And all those, who enter voluntarily into such civil compacts with one another, are as to matters of government free and independent, *so long as* government is administered agreeable to the principles of this their political constitution.¹⁰⁸

Both the individual states, as the creatures of "civil compacts voluntarily and solemnly entered into" that were governed by "civil constitutions," and the "national confederation," created by a "solemn covenant" between the states, thus could wield authority without infringing liberty "so long as" the terms of the relevant "governmental compacts" were observed.¹⁰⁹ Jefferson therefore took his Resolutions immediately from the Revolutionary principle of nonsubmission to the linked constitutional principle of compact. In doing so, Jefferson converted the general image of the federal

nothing but absolute necessity can justify a people in breaking the bands of society" by opposing government or "enflam[ing] a spirit of disobedience and rebellion." *Id.* at 1034-35 (emphasis omitted).

¹⁰⁶ Ky. Res. 1798, *supra* note 6, at 133.

¹⁰⁷ Late eighteenth-century usage did not distinguish "compact" and "contract." See, e.g., Samuel Johnson, *A Dictionary of the English Language* (London, James Duncan & Son, 10th ed. 1792), which treated the words as synonyms.

¹⁰⁸ *Amicus Republicae, Address to the Public, Containing Some Remarks on the Present State of the American Republics, etc.* (Exeter, N.H. 1786), *reprinted in* 1 *American Political Writing During the Founding Era 1760-1805*, *supra* note 105, at 638, 639 (emphasis added).

¹⁰⁹ *Id.* at 639-40. The "federal constitution" that this writer had in mind was, of course, the Articles of Confederation.

Constitution as a compact into a fundamental political ontology of the Union.

The states, Jefferson wrote, “by compact, under the style and title of a Constitution for the United States, and of amendments thereto . . . constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government.”¹¹⁰ The federal government’s powers, therefore, were “definite,” limited,¹¹¹ and entirely derived from the Constitution’s special delegations of power. Jefferson’s language implicitly targeted the contrary view propounded by nationalists that the federal government possessed implied powers derived not from the Constitution but by succession to the Crown or as incidents of sovereignty.¹¹² The Virginia Resolutions made a similar point, with a characteristically Madisonian stress on the textuality of “the constitutional charter.”¹¹³

Jefferson and Madison parted company over the exact nature of the constitutional compact creating and defining federal authority, although their disagreement was not obvious to all readers then or later. For Madison, the Constitution was the creature of collective action by the states as a body.¹¹⁴ Jefferson, however, held a different view. According to him, the contract was between each individual state and the rest of the states as a body: “to this compact

¹¹⁰ Ky. Res. 1798, *supra* note 6, at 130.

¹¹¹ “[W]hensoever the general government assumes undelegated powers, its acts are unauthorized, void, and of no force.” *Id.*

¹¹² See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470-71 (1793) (Jay, C.J.); *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 80-81 (1795) (Paterson, J.).

¹¹³ Va. Res., *supra* note 6, at 189. The Virginia Resolutions stated that the General Assembly “view[ed] the powers of the federal government, as resulting from the compact to which the states are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorised by the grants enumerated in that compact.” *Id.* Jefferson’s parallel reference was separated from his general account of the nature of the Constitution and linked more clearly to the notion of the states’ intentions instead of the “intent” of the text. Ky. Res. 1798, *supra* note 6, at 132 (stating that the Constitution is to be interpreted “according to the plain intent and meaning in which it was understood and acceded to by the several parties”).

¹¹⁴ Va. Res., *supra* note 6, at 189 (“the states . . . are parties” to the compact). During the nullification crisis of 1828-33, Madison repeatedly insisted that his use of the plural was intentional and significant. See, e.g., Madison, *supra* note 28, at 420-24.

each state acceded as a state and is an integral party, its co-states forming, as to itself, the other party."¹¹⁵

This seemingly esoteric disagreement in fact created an extremely important practical difference between Madison's and Jefferson's views. Although the 1798 Virginia Resolutions used strong rhetoric about the states' right and duty of "interposition" in cases of flagrant federal overreaching,¹¹⁶ Madison's contractualism did not in fact license any legally significant action by an individual state. The authority of the states over the Constitution and its interpretation was collective and could be exercised only in concert through the electoral process or by a quasi-revolutionary act of the people themselves.¹¹⁷ The Virginia Report of 1800 further explained that the Resolutions involved no claim by the state legislature that its announcement of its constitutional views was of legal significance. "The declarations in such cases, are expressions of opinion, unaccompanied with any other effect, than what they may produce on opinion, by exciting reflection."¹¹⁸ For Madison, the

¹¹⁵ Ky. Res. 1798, *supra* note 6, at 130. In his *Resolutions* Elliot reproduced a defective text of the Kentucky Resolutions of 1798 as adopted that omitted the phrase "its co-states forming, as to itself, the other party." *Resolutions*, *supra* note 3, at 15; see Ethelbert D. Warfield, *The Kentucky Resolutions of 1798: An Historical Study* 183 (New York & London, G.P. Putnum's Sons 2d ed. 1894). Elliot's text of Jefferson's "Original Draught" correctly included the phrase. *Resolutions*, *supra* note 3, at 61. The source of this error is unknown; it was often repeated in later printings of the *Resolutions*.

¹¹⁶ The 1798 Resolutions stated that "in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them." Va. Res., *supra* note 6, at 189.

¹¹⁷ In the Virginia Report of 1800, Madison carefully defined the "states" that are "parties to the compact" so as virtually to eliminate any difference between (his version of) state compact theory and the nationalist view that the Constitution was created by "the people." See Rep. 1800, *supra* note 7, at 308-09. While agreeing that the word "states" sometimes referred to "the separate sections of territory occupied by the political societies within each" or to the governments or political organization of those societies, Madison insisted that the "states" that were parties to the Constitution were "the people composing those political societies, in their highest sovereign capacity." *Id.* Refusing to recognize the interpretive authority of "the states" defined in this way, Madison added, would be "a plain denial of the fundamental principle on which our independence itself was declared." *Id.* at 311.

¹¹⁸ *Id.* at 348. Madison immediately contrasted the pronouncements on constitutional issues by "citizens [or] legislatures" with judicial decisions on the "meaning" of the Federal Constitution: "The expositions of the judiciary . . . are carried into immediate effect by force." *Id.*

interpretive authority of the “states” was political rather than legal in nature.

Under Jefferson’s view, in contrast, because each state was party to a bilateral contract, there seemingly could be in principle no collective decision binding an individual state. “[A]s in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.”¹¹⁹ Precisely what individual state action Jefferson had in mind was unclear. In his original draft, Jefferson stated that if the federal government abused its powers, the proper corrective action would be political: “the members of the General Government being chosen by the people, a change by the people would be the constitutional remedy.”¹²⁰ However, where (as in the case of the Alien and Sedition Acts) the federal government assumed undelegated powers,

a nullification of the act is the rightful remedy; that every State has a natural right in cases not within the compact, *casus non foederis*, to nullify of their own authority all assumptions of power by others within their limits . . . [Therefore, the legislature “doubts not” that] the co-States, recurring to their natural right in cases not made federal, will concur in declaring these acts void and of no force, and will each take measures of its own for providing that neither these acts nor any others of the General Government not plainly and intentionally authorized by the Constitution shall be exercised within their respective territories.¹²¹

These passages appear to claim for each individual state a legal power to declare unconstitutional and void within its borders federal laws deemed to involve a usurpation of power. The Resolutions as adopted by the Kentucky legislature omitted the sentences, perhaps for this reason,¹²² and when the Resolutions of 1799 declared that “nullification” was “the rightful remedy” for federal overreaching, the legislature carefully ascribed this remedy to the

¹¹⁹ Ky. Res. 1798, *supra* note 6, at 130.

¹²⁰ Thomas Jefferson, Draft of the Kentucky Resolutions, in *The Writings of Thomas Jefferson*, *supra* note 16, at 156, 159-60.

¹²¹ *Id.* at 160-62.

¹²² Compare Warfield, *supra* note 115, at 180-85 (attributing deletion to John Breckinridge, the legislator who introduced the Resolutions) with Adrienne Koch, *Jefferson and Madison: The Great Collaboration 188-89* (1950) (attributing deletion to a deliberate decision by the legislature).

states collectively, thus equating its position with that of Madison and the Virginia Resolutions.¹²³

Ever since the South Carolina nullifiers of 1828-1833 invoked Jefferson's name as authority for their claim that a state convention can exercise such a power, Jefferson's exact meaning has been the subject of debate.¹²⁴ During the nullification crisis, Madison consistently maintained that Jefferson did not intend to endorse "any *constitutional* right of nullification" by an individual state: "the right of nullification meant by Mr. Jefferson is the natural right, which all admit to be a remedy against insupportable oppression."¹²⁵ Madison's interpretation is supported by Jefferson's repeated use of the term "natural right" and by the Lockean background of Jefferson's political thought.¹²⁶ In any event, the princi-

¹²³ See Ky. Res. 1799, *supra* note 6, at 138. That the 1799 Resolutions deliberately interpreted the notion of nullification in a Madisonian political-remedy fashion is shown, I think, by the Resolutions' description of their purpose. Because the Alien and Sedition Acts were "palpable violations" of the Constitution, the Resolutions asserted that "silent acquiescence" in them would be "highly criminal," and so the "commonwealth does now enter against them its solemn protest." *Id.* The Resolutions implicitly conceded that the state's individual means of resisting the Acts were political in nature. "[A]lthough this commonwealth, as a party to the federal compact, will bow to the laws of the Union, yet it does, at the same time, declare that it will not now or ever hereafter cease to oppose, in a constitutional manner, every attempt, at what quarter soever offered, to violate that compact." *Id.*

¹²⁴ On the nullification-era divisions within the heirs of 1798 Republicanism, see the already classic study by Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (1987).

¹²⁵ Madison, *supra* note 28, at 428-29 & 428 n.3. Madison's interpretation of Jefferson's meaning was, I think, his candid opinion, although his firm opposition to the South Carolina nullifiers obviously raises the possibility that his understanding of Jefferson was warped by his own political views. See also Adrienne Koch, Madison's "Advice to My Country" 130-31 (1966) (quoting Letter from James Madison to Edward Everett (Sept. 10, 1830): "Still I believe that he did not attach to it [nullification] the idea of a constitutional right in the sense of S. Carolina, but that of a natural one in cases justly appealing to it.").

¹²⁶ Locke wrote that the "commission or command of any magistrate, where he has no authority" is "as void and insignificant as that of any private man," and that resistance to the magistrate's acts was lawful where there could be no "appeal to the law" as a remedy. John Locke, *The Second Treatise of Government* §§ 206, 207 (Thomas P. Peardon ed., 1952) (1690). Where "the legislators act contrary to the end for which they were constituted," he added, they themselves become "rebels" and the people are entitled to resist their unlawful commands. *Id.* § 227. The efforts to deny Jefferson's basic adherence to Lockean political theory have, I think, failed, although the "civic republican" scholars are no doubt correct that Jefferson—and Locke himself—were significantly influenced by non-Lockean republicanism.

ples of '98 as publicly announced at that time did not endorse individual states' resistance to federal authority.

In the end, however, I suggest that attempts to render definite what the documents of 1798-1800 left ambiguous mistake the fundamental point of the language of compact. The notion of the constitutional compact, as employed in that period and later (except by the nullifiers) was not a literal definition of the Constitution's metaphysical nature; instead, it served as a metaphor for the Constitution's ultimate subordination to the people and thus for the legitimacy of popular authority regarding the Constitution's interpretation.¹²⁷

The Virginia Report of 1800 summarized the meaning of the Virginia Resolutions' paragraph defining the Constitution as a compact as "a declaratory recurrence" to the principle

which characterized the epoch of our revolution, and which form the basis of our republican constitutions The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be

¹²⁷ This understanding of the compact as a metaphor is supported by the fluidity of the term's use: Madison's multilateral and Jefferson's unilateral accounts of a contract between states continued to be used side-by-side throughout the antebellum period, as did the quite different image of the Constitution as a compact between the states and the United States. The Pennsylvania legislature's resolutions against a renewal of the national bank charter in 1811 provide a remarkable example of the extent to which Republicans used the metaphor of compact without much concern for the precise nature of the compact.

The People of the United States, by the adoption of the federal constitution, established a General Government for special purposes To the compact, thereby created, each State acceded, in its charter, as a State, and is a party; the United States forming, as to it, the other party—the act of union, thus entered into, being, to all intents and purposes, a treaty between sovereign States.

Rep. Leib, Speech Before the House of Representatives on the Bill to Renew the Charter of the Bank of the United States (February 12, 1811), *in* Legislative and Documentary History of the Bank of the United States 315 (M. St. Clair Clarke & D.A. Hall eds., Washington, D.C., Gales & Seaton 1832) (reading into record resolution of Pennsylvania General Assembly instructing its Senators and Representatives). Herman Ames and I both reproduced a defective text of these resolutions that omitted the reference to the United States as "the other party" to the compact. See Resolutions of Pennsylvania Against the Bank (Jan. 11, 1811), *in* State Documents, *supra* note 19, at 52; Powell, *supra* note 6, at 258. The errors of omission (affecting the understanding of "compact") in widely reproduced texts of the 1811 Pennsylvania Resolutions, *supra*, and the 1798 Kentucky Resolutions, see *supra* note 115, are curious.

kept in mind; and at no time perhaps more necessary than at the present.¹²⁸

The states' interpretive authority was a mode of political activity, intended to "lead to a change in the legislative [i.e., congressional] expression of the general will; possibly to a change in the opinion of the judiciary."¹²⁹ The Republican definition of the Constitution thus was primarily an image or reminder of popular sovereignty and popular control over the government rather than a proposition about federal-state relations.

3. *The Constitution of Suspicion*

The Republicans' account of the Constitution as a compact did not necessarily point to a particular view on the scope of federal power or to the assumptions Republicans thought should guide constitutional interpretation. Neither did the Republicans' insistence that constitutional debate is essentially a legal discussion of the proper interpretation of a written instrument. As "Brutus" had pointed out during the ratification era,¹³⁰ and as nationalist lawyers such as Hamilton repeatedly argued in the 1790s, the common law's canon of interpretive techniques included some that would license broad congressional power on the basis of the text.

Hamilton's 1791 defense of the bank bill insisted that the "intention" of the Constitution and its framers "is to be sought for in the instrument itself, according to the usual [and] established rules of construction."¹³¹ The objections to the bank bill, Hamilton maintained, were "contrary to this sound maxim of construction namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country . . . ought to be construed liberally, in advancement of

¹²⁸ Rep. 1800, *supra* note 7, at 312.

¹²⁹ *Id.* at 348. During the Alien and Sedition Acts crisis, Republican spokesmen repeatedly called on the federal courts to declare the Sedition Act unconstitutional. See, e.g., 5 *Annals of Cong.* 2088, 2111 (1851) (statement of Rep. Albert Gallatin, July 5, 1798: "[A]n appeal must be made to another tribunal, to the Judiciary in the first instance, on the subject of a supposed unconstitutional law."); *id.* at 2139, 2152 (reporting statement of Rep. Nathaniel Macon, July 10, 1798: "Mr. M[acon] concluded that . . . he could only hope that the Judges would exercise the power placed in them of determining the law an unconstitutional law.").

¹³⁰ See *supra* notes 32-33 and accompanying text.

¹³¹ Hamilton, *supra* note 36, at 111.

the public good.”¹³² The “criterion of what is constitutional, and of what is not so,” to be applied to federal legislation was conformity with the federal government’s authorized ends: “If the end be clearly comprehended within any of the specified powers, [and] if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.”¹³³ Since Hamilton also insisted that all questions of the degree of relationship between a proposed statute and Congress’ enumerated purposes were matters for the exercise of political discretion,¹³⁴ his view, and that of other early nationalists, implicitly left Congress broad scope for the exercise of unenumerated powers that, in Congress’ opinion, would serve the goals designated in the constitutional text.¹³⁵ The bank bill was constitutional, Hamilton reasoned, because a national bank would have “a relation more or less direct” to the accomplishment of the goals of the powers to tax, to borrow, to regulate interstate commerce, and to raise and support armies and navies; he further argued that the bill was “*clearly*, within the provision which authorises the making of all

¹³² Id. at 104-05.

¹³³ Id. at 107.

¹³⁴ Hamilton’s sovereignty argument was, of course, an elaborate denial of the existence of legal limits on congressional actions within the sphere of legitimate congressional authority. Hamilton again addressed the issue in rebutting Jefferson’s interpretation of the Necessary and Proper Clause:

The *expediency* of exercising a particular power, at a particular time, must indeed depend on *circumstances*; but the constitutional right of exercising it must be uniform [and] invariable—the same to day, as to morrow. . . .

The *degree* in which a measure is necessary, can never be a test of the *legal* right to adopt it. That must ever be a matter of opinion; and can only be a test of expediency.

Id. at 102, 104.

¹³⁵ In a pamphlet attacking the Virginia Report of 1800, Pennsylvania Federalist Alexander Addison wrote that the Constitution “gives to Congress power over the means, and imposes the duty of providing for the general welfare in all cases whatever, to which in its discretion the means ought to be applied.” Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly, in 2 American Political Writing During the Founding Era 1760-1805, supra note 105, at 1055, 1066; see also United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) (Marshall, C.J.) (arguing that Congress “must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution”).

needful rules [and] *regulations* concerning the *property* of the United States.”¹³⁶

Jefferson’s 1791 bank bill opinion, in contrast, presented a very different vision of the nature of American constitutionalism. The opinion defined the federal Constitution as resting on a fundamental suspicion of national power embodied in the Tenth Amendment: “I consider the foundation of the Constitution as laid on this ground: That ‘all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people.’”¹³⁷ The point of the Tenth Amendment, and thus for Jefferson of the Constitution itself, was to preserve freedom by imposing strict legal limits on federal power. The Constitution “was intended to lace [Congress] up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect.”¹³⁸ Judged under this stringent standard, Jefferson argued, the bank bill could not be justified as an exercise of any of the “specially enumerated” powers or under the Necessary and Proper Clause.¹³⁹

The impetus behind Republican textualism, as Jefferson portrayed it, was the old English “Country” suspicion of power, of the inherent tendency of government to seek limitless authority and thus, in effect, tyranny. There was, Jefferson assumed, no middle ground between confining Congress to strictly defined powers and acknowledging congressional omnicompetence. “To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.”¹⁴⁰ Jefferson viewed as specious the belief of nationalists such as Ames that the Constitution adequately limits Congress by designating the goals of congressional action. In rejecting the argument that the first clause of

¹³⁶ Hamilton, *supra* note 36, at 121.

¹³⁷ Thomas Jefferson, Opinion Against the Constitutionality of a National Bank (February 15, 1791), in *The Writings of Thomas Jefferson*, *supra* note 16, at 145, 146.

¹³⁸ *Id.* at 148.

¹³⁹ *Id.* at 146. Jefferson’s specific arguments addressing the Necessary and Proper Clause closely tracked Madison’s, although Jefferson’s interpretation of the latter was even more restrictive: the clause, Jefferson concluded, “restrained [Congress] to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory.” *Id.* at 149-50.

¹⁴⁰ *Id.* at 146.

Section 8 gave Congress the power “*to do anything they please* to provide for the general welfare,”¹⁴¹ Jefferson wrote that this

would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please.¹⁴²

In Jefferson’s opinion, the distrust of power—and of reason’s ability to direct power—that was to animate much of Republican constitutionalism was clear. The solution to the paradox that government is necessary but government is intrinsically threatening, for Jefferson and for Republicans generally, was a peculiarly legal one. They believed in the need to confine the national government to those powers a suspicious eye would find clearly delegated in the constitutional text. The preservation of liberty required that the Constitution be read with a bias against power.¹⁴³

The Republican state papers of 1798-1800 were replete with statements of the Republican distrust of power—particularly national, centralized power.¹⁴⁴ The Kentucky Resolutions of 1798

¹⁴¹ Id. at 148. Jefferson reasoned that the Clause’s reference to “the general welfare” designated the purpose for which Congress could tax, and that interpreting the reference as delegating “a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.” Id.

¹⁴² Id.

¹⁴³ From Jefferson’s perspective, Hamiltonian constitutionalism surrendered any means of principled objection to unconstitutional congressional action. Jefferson maintained that Hamilton had no basis on which to object to “any non-enumerated power[s] . . . for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers.” Id. at 149. Jefferson’s austere textualism, Hamilton in turn contended, was a fraud, because the “exercise of power by *implication* or *construction*” was indispensable and yet necessarily accompanied by risk. Hamilton, *supra* note 36, at 106. On the one hand, “[t]he moment the literal meaning is departed from, there is a chance of error and abuse,” but on the other, “an adherence to the letter of its powers would at once arrest the motions of the government.” Id. In cases neither clearly within nor clearly without national power, “controversy [and] difference of opinion” were unavoidable because “difficulties on this point are inherent in the nature of the foederal [sic] constitution.” Id. at 107. As to such cases, Congress’ judgment that an action would serve Congress’ authorized ends should be presumptively correct. Id.

¹⁴⁴ In this context, it is unsurprising that the documents of 1798-1800 did not address the question of limiting state governments. But see Ky. Res. 1798, *supra* note 6, at 133 (invoking the American “attachment to limited government, whether general or particular”).

explained that “to submit to undelegated” powers necessarily was to submit to “unlimited” ones;¹⁴⁵ the Alien Act therefore threatened the liberties of all by reducing some of “the inhabitants of these states . . . to absolute dominion of one man” and “the passions and power of a majority of Congress.”¹⁴⁶ The Federalist argument that Congress and the President would be effectually restrained by their constitutional obligation to exercise reasoned judgment in carrying out their duties was, the Resolutions implied, a fraud because it assumed that reason could constrain will. The Constitution could not, however, be understood to have made the federal government the “exclusive or final judge of [its] powers . . . since that would have made its discretion, and not the Constitution, the measure of its powers.”¹⁴⁷ Madison argued that the “inevitable consequence” of the nationalist expansion of federal power “would be, to transform the present republican system of the United States, into an absolute, or at best a mixed monarchy”¹⁴⁸ through the creation of an imperial presidency.¹⁴⁹

Against the ultimate nationalist argument, that where governmental power cannot be limited “consistently with its use,” the people “must be content to repose a salutary confidence” in the government,¹⁵⁰ Jefferson composed a virtual hymn to suspicion:

¹⁴⁵ *Id.* at 132.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 130. The nationalists’ arguments, Jefferson wrote, asked the people “to surrender the form of government we have chosen, and live under one deriving its powers from its own will, and not from our authority.” *Id.* at 133. The Virginia Report of 1800 argued that treating the constitutional decisions of the federal courts as final “in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts[,] . . . would annul the authority delegating it.” Rep. 1800, *supra* note 7, at 311.

¹⁴⁸ Va. Res., *supra* note 6, at 189.

¹⁴⁹ Rep. 1800, *supra* note 7, at 316.

¹⁵⁰ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798) (Iredell, J.). Justice James Iredell was responding to Justice Samuel Chase’s apparent suggestion that in America legislative power was limited by extratextual principles as well as by written constitutional instruments. *Id.* at 387-89. The fact that here Federalist Iredell was espousing textualism is a “salutary” reminder that political and ideological lines were not fixed or unambiguous in the 1790s. Iredell’s textualism, however, differed fundamentally from that of the principles of ’98 because it was informed not by suspicion of power but by the nationalists’ belief in the necessity of broad power to protect “the operations of government” and the safety of society. *Id.* at 400. Compare *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 181-83 (1796) (Iredell, J.) (holding federal carriage tax constitutional) with Rep. 1800, *supra* note 7, at

[I]t would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights; . . . confidence is everywhere the parent of despotism; free government is founded in jealousy, and not in confidence; it is jealousy, and not confidence, which prescribes limited constitutions to bind down those whom we are obliged to trust with power; that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go

In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.¹⁵¹

Human nature and historical experience, the principles of '98 proclaimed, demand ceaseless vigilance against "the men of our choice" as the price for the preservation of liberty. The written Constitution, the Republicans believed, provided the foundation on which the people could undertake to sustain this burden.

II. THE PRINCIPLES OF '98: CONTEMPORARY REFLECTIONS

A. *The Lawyers' Constitution*

Contemporary American constitutional law "depends on an assumption that 'the law' has an objective existence outside the political and policy preferences of the judges" who are its primary custodians;¹⁵² a fortiori, constitutional law should be an autonomous discourse quite distinct from the messy, subjective, interest-group-driven disputes of the political process and its partisan participants. Even though these assumptions have been subjected to withering criticism for a century,¹⁵³ they remain central both to the theory and the practice of American constitutionalism. In the pref-

312-13 (identifying the carriage tax as one of the two most obviously unconstitutional federal statutes prior to the Alien and Sedition Acts).

¹⁵¹ Ky. Res. 1798, *supra* note 6, at 133. I have silently deleted a few uses of the word "that" which the resolution format imposed on Jefferson's rhetoric.

¹⁵² William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life* 55 (1988).

¹⁵³ Jennifer Nedelsky, to choose one distinguished example, dates the beginning of the criticism of the law/politics distinction to the legal realists. See Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 Harv. L. Rev. 340, 352 n.36 (1982). I would put the inception of (modern) criticism further back. See H. Jefferson Powell, *The Moral Tradition of American Constitutionalism* 142-48 (1993).

ace to the second edition of his treatise on constitutional law, the great doctrinalist Laurence Tribe explains that his experience as teacher and Supreme Court advocate in the decade since the first edition had gained for him "a deeper appreciation of the very great difference between *reading* the Constitution we have and *writing* the Constitution some of us might wish to have."¹⁵⁴

Contemporary constitutionalists typically ascribe the dominance of this distinction between "*reading* the Constitution we have" and political argument to John Marshall and his Court, although there is great disagreement over whether Marshall therefore is to be praised or condemned.¹⁵⁵ This Essay's examination of the principles of '98 suggests that in either case Marshall is receiving too much (dis)credit. The nationalistic Federalism with which Marshall usually is associated¹⁵⁶ pointed toward a looser association between constitutionalism and law, at least law of the technical lawyer's variety. Nationalists of the 1790s often displayed something close to impatience with the Republicans' legalistic mode of constitutional argument. The existence of "controversy [and] difference of opinion" over a question of constitutional power, Hamilton wrote, indicated that Congress was entitled to "a reasonable latitude of judgment,"¹⁵⁷ judgment governed by Congress' views of the national good, not by lawyers' quibbles over "the particulars" of the constitutional text.¹⁵⁸ Writing of Congress' power to appropri-

¹⁵⁴ Laurence H. Tribe, *American Constitutional Law* at iii (2d ed. 1988).

¹⁵⁵ For praise, see, e.g., George L. Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-15*, in 2 *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (1981). For criticism, see, e.g., Nedelsky, *supra* note 153, at 350-60 (reviewing Haskins & Johnson, *supra*); see also Wiecek, *supra* note 152, at 55 (noting that although the assumption of law's objectivity has often been challenged, "it is a measure of Marshall's achievement that he set the agenda of th[e] debate").

¹⁵⁶ Contemporaneous nationalists sometimes were less certain of Marshall's loyalty to their creed than modern scholars tend to be. Marshall, they feared, was tainted by the legalistic approach to construing federal power characteristic of many of his fellow Virginians. Oliver Wolcott, for example, wrote that Marshall "is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts of which his friends will not perceive the importance." Letter from Oliver Wolcott to Fisher Ames (Dec. 29, 1799), in 2 *Works of Fisher Ames*, *supra* note 75, at 1334, 1337.

¹⁵⁷ Hamilton, *supra* note 36, at 107.

¹⁵⁸ *Id.* at 116. This citation is to a section of Hamilton's 1791 bank opinion where he ridiculed Randolph's attempt to list all the textually explicit powers conceivably relevant to the incorporation of a bank.

ate money, he asserted, "It is therefore of necessity left to the discretion of the National Legislature, to pronounce, upon the objects, which concern the general Welfare, and for which under that description, an appropriation of money is requisite and proper."¹⁵⁹ Even after the Republicans took control of Congress and the presidency in 1801 and had political reason to invoke legal arguments to protect their interests,¹⁶⁰ Federalists generally treated constitutional argument as a species of political reasoning continuous with the specifically political and policy considerations of statesmanship. The federal courts in the first decade of the nineteenth century, dominated by Federalist judges, usually shared this approach.¹⁶¹

¹⁵⁹ Alexander Hamilton, Final Version of the Report on the Subject of Manufactures (Dec. 5, 1791), in 10 *The Papers of Alexander Hamilton* 230, 303 (Harold C. Syrett ed., 1966). Hamilton denied that this reasoning made Congress effectively omniscient because it was confined to the spending power. *Id.* at 303-04. In the Virginia Report of 1800, Madison replied that there was no practical difference between a power to spend for the general welfare and one to legislate generally:

Now whether the phrases in question [the reference to "the common Defense and the general Welfare" in Article I, § 8, Clause 1] be construed to authorise every measure relating to the common defence and general welfare, as contended by some; or every measure only in which there might be an application of money, as suggested by the caution of others, the effect must substantially be the same For it is evident that there is not a single power whatever, which may not have some reference to the common defence, or the general welfare; nor a power of any magnitude which in its exercise does not involve or admit an application of money. The government therefore which possesses power in either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers.

Rep. 1800, *supra* note 7, at 314-15.

¹⁶⁰ Nationalistic Federalists continued to support an expansive opinion of federal power and to criticize the Republicans (now the wielders of that power) for their narrow-construction views. Fisher Ames, for example, wrote in 1804 that "[i]t is seen that the systematic policy of the [Republican federal] government is to throw back to the states almost everything, and though not in form yet by this, to renew the old Confederation." Fisher Ames, *The Republican XIII*, *Boston Gazette*, Sept. 27, 1804, *reprinted in* 1 *Works of Fisher Ames*, *supra* note 75, at 230, 232. The choleric New Englander Ames asserted that the underlying purpose of Republican constitutionalism was "to sacrifice everything to Virginia." *Id.*

¹⁶¹ Among many examples, see *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805). In *Fisher*, Chief Justice John Marshall adopted Hamilton's generous view of Congress's discretion in employing implied powers in order to uphold the constitutionality of a statute giving the United States priority in the distribution of insolvent estates. "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution." *Id.* at 395. Nationalist judges often displayed the same preference for arguments that were not narrowly legalistic

The missing connection in the usual account of constitutional development between the constitutional statesmanship of the early nationalists and the text-centered constitutional law of the later Marshall Court was the triumph of the Republican principles of '98.¹⁶² The most prominent characteristic of Republican thought was its insistence on textualism, on confining constitutional argument to discussion of the legal construction of the constitutional instrument. The Republicans' remarkable political success after 1800 gave their approach to the Constitution the aura of popular approval; by the middle of the century's second decade, nationalists (many of them Republicans politically) generally expressed their views in rigorously textual terms.¹⁶³ Marshall's famous opinion in *McCulloch v. Maryland*¹⁶⁴ upholding the constitutionality of a national bank is often, and rightly, viewed as dependent on Hamilton's 1791 bank opinion. What modern scholars tend to ignore are the striking similarities between Marshall's reasoning and rhetoric and a series of brilliant speeches by Republican congressmen in 1817 and 1818 that defended a broad view of federal power on strictly textual terms.¹⁶⁵

The textualism of the principles of '98, by shaping public constitutional discourse, played a key role in creating the assumption that the Constitution, as something "read" in a lawyerly fashion, is

in dealing with claims of individual constitutional rights. Justice Bushrod Washington rejected a literal reading of the statute at issue in *Fisher* because such a reading, and the majority's constitutional judgment upholding the statute so read, violated "the principles of immutable justice" and would lead to "the most cruel injustice to individuals." *Id.* at 402 (Washington, J., taking no part in decision but dissenting from the reasoning thereof); see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (restraining a Georgia statute to prevent it from violating vested property rights "either by general principles which are common to our free institutions, or by the particular provisions of the constitution").

¹⁶² The Marshall Court's early "openness to natural law quickly disappeared" and the Court "subsumed higher-law principles" concerning individual rights into textual argument. Wiecek, *supra* note 152, at 44. The already classic account of this process of textualizing the older Federalist invocation of "the natural rights of man" is G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, in 3-4 *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (1988).

¹⁶³ The most remarkable example, perhaps, was Justice Joseph Story's opinion in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 323 (1816). Story, a nationalistic Republican, used a classically Republican parsing of the words of Article III to defend Supreme Court jurisdiction over state court federal-question decisions. See R. Kent Newmyer, *Supreme Court Justice Joseph Story* 106-12 (1985).

¹⁶⁴ 17 U.S. (4 Wheat.) 316 (1819).

¹⁶⁵ See Powell, *supra* note 6, at 311-24, for selections and analysis of those speeches.

quite distinct from the questions of morality and expediency debated by statesmen and politicians. An early example of this tendency, and an important vehicle by which it was propagated,¹⁶⁶ can be seen in St. George Tucker's 1803 edition of Blackstone's *Commentaries*.¹⁶⁷ A prominent Republican state judge and professor of law at William and Mary, Tucker added to the *Commentaries* a series of appendices, one of which was a substantial academic interpretation of the Constitution. Tucker's approach throughout was based on a painstaking analysis of the language of the text. In discussing congressional power, for example, he attempted to assemble every clause in the Constitution that could be construed to provide a basis for federal legislation.¹⁶⁸ Perhaps even more importantly, however, Tucker explicitly treated constitutional interpretation as simply another species of law, no different in underlying intellectual structure than statutory interpretation or the law of real property. As such, Tucker, assumed that the ordinary locus for constitutional discussion was the courtroom.¹⁶⁹ The principles of '98, formulated and proclaimed by statesmen and legislators, reduced American constitutionalism to the constitutional law enforced by the courts.

The "lawyerizing" of the Constitution that is, I suggest, largely a product of the principles of '98 carries with it a variety of effects. The transformation has narrowed the possible meaning and significance of the Constitution. Early Federalists such as Fisher Ames and Samuel Chase expected constitutional discussion to involve consideration of "the natural rights of man"¹⁷⁰ and "the great first

¹⁶⁶ See Bernard Schwartz, *Main Currents in American Legal Thought* 161 (1993).

¹⁶⁷ 1 Blackstone's *Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

¹⁶⁸ *Id.* note D, app. at 140, 180-85.

¹⁶⁹ If the federal government "should exercise powers not warranted by the constitution . . . where the act of usurpation may immediately affect an individual, the remedy is to be sought by recourse to th[e] judiciary." *Id.* app. at 153. In the case of congressional legislation violating the federal Bill of Rights, "it would . . . be the province of the judiciary to pronounce whether any such act were constitutional, or not . . ." *Id.* app. at 357. Tucker believed that the political process and the amendment power were the checks on congressional misdeeds that invaded state prerogatives without harming particular individuals. *Id.* app. at 153.

¹⁷⁰ Ames, *supra* note 75, at 856 (defending the national bank).

principles of the social compact."¹⁷¹ The Republicans' success in defining constitutionalism as the legal construction of a text meant that such considerations could be dealt with only so far as they could be treated as explicitly or implicitly addressed by the text. "[T]he designation of an issue as law confines debate in a particularly important way: it removes or obscures aspects of class or social conflict. As a consequence, our tradition of political thought has been limited."¹⁷² Legal discourse is, intentionally and unavoidably, relatively narrow and usually technical. By channeling many basic political issues into the mold of constitutional "law," our society has limited both the questions it will seriously address and the participants it will easily hear.

The primary institutional consequence of Republican textualism ultimately has been an enormous growth in the power of the judiciary. Early Republican judges inferred from the legal nature of American constitutions a very high doctrine of judicial power. The exposition of the Constitution, Spencer Roane wrote in 1804, was the peculiar task of the courts: "a legislative construction of the law and constitution . . . however respectable . . . must yield to that of the judiciary."¹⁷³ William Johnson, Jefferson's first Supreme Court appointee, wrote in 1808 that "the courts are the constitutional expositors [of federal law]; and every department of government must submit to their exposition; for laws have no legal meaning but what is given them by the courts to whose exposition they are submitted."¹⁷⁴ Although Jefferson in particular intended no such result, treating the Constitution's provisions as rules of law, as Madison predicted, has led "independent tribunals of justice [to] consider themselves in a peculiar manner the guardians"¹⁷⁵ of those provisions. General social acceptance of that guardianship

¹⁷¹ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.).

¹⁷² Nedelsky, *supra* note 153, at 360. I would not confine the narrowing effect of treating constitutional issues as legal ones to questions of "class or social conflict" unless the latter term is taken very broadly.

¹⁷³ *Turpin v. Locket*, 10 Va. (6 Call) 113, 172-73 (1804).

¹⁷⁴ *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 364 (C.C.D.S.C. 1808) (No. 5420). Justice William Johnson, like other Republicans, viewed the Constitution as "law" in a perfectly straightforward sense. See, e.g., *Satterlee v. Mathewson*, 27 U.S. (2 Pet.) 380, 416 app. at 681 (1829) (discussing the meaning of the *ex post facto* clauses).

¹⁷⁵ James Madison, Speech on the Amendments to the Constitution (June 8, 1789), in 12 *The Papers of James Madison* 197, 207 (Charles F. Hobson, Robert A. Rutland, William M.E. Rachal & Jeanne K. Sisson eds., 1979).

has enabled the courts to enjoy a remarkable degree of success in insisting on obedience from other institutions to the judicial view of those institutions' powers and responsibilities.¹⁷⁶ By treating constitutional discussion as legal interpretation, Jefferson and Madison became, ironically, the parents of the lawyers' monopoly on constitutional debate and even of judicial supremacy.

B. *The Changing Constitution*

Republican textualism had another consequence of considerable, if often unnoticed, significance. On its face, textualism is a means of fixing constitutional meaning. Under American written constitutions, Tucker wrote, "the constitution is not an 'ideal thing, but a real existence: it can be produced in a visible form:' its principles can be ascertained from the living letter, not from obscure reasoning or deductions only."¹⁷⁷ Defending the continuing validity of the principles of '98 in an 1811 congressional debate, Representative Peter Porter told his colleagues that neither practice nor precedent were the sources of constitutional authority to which they should submit: "[E]very member has a *printed Constitution* on his table before him—a Constitution drawn up with the greatest care and deliberation."¹⁷⁸ In practice, however, textualism has been the source of two distinct tendencies in American constitutionalism, both of which unsettle or change constitutional meaning.

In America, with its common-law legal heritage, the operative meaning of constitutional texts, like that of statutory texts, evolves over time. Judicial applications of the text to particular controversies build on earlier decisions and in turn are interpreted and reconciled by the creation of constitutional law doctrine that is linked to the originating text in an increasingly genealogical manner. The evolutionary nature of the common law's dealing with normative instruments was well understood at the time the principles of '98

¹⁷⁶ I do not intend this entirely as a compliment. The question of the extent to which the judiciary's "successes" have been socially beneficial is a good deal closer, I think, than is often assumed. See, e.g., Girardeau A. Spann, *Race Against the Court* (1993). But see Charles L. Black, Jr., *On the Failure and Success of Courts*, in *The Humane Imagination* 140 (1986) (providing that great lawyer's optimistic conclusion).

¹⁷⁷ *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 78 (1793).

¹⁷⁸ 22 *Annals of Cong.* 627 (1853) (statement of Rep. Peter B. Porter, Jan. 18, 1811) (arguing that establishing a Bank of the United States is unconstitutional).

were articulated, and some Republicans, Jefferson among them, periodically objected to the conversion of the written Constitution into an evolving system of common law. Other Republicans, from the beginning, accepted the legitimacy of the common law development of the law of the Constitution. Madison, who consistently accepted the authority of settled precedent contrary to his own view of the meaning of the uninterpreted text, believed "that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions."¹⁷⁹ Constitutional interpretation, he reasoned, benefits by "the illustration to be derived from a series of cases actually occurring for adjudication."¹⁸⁰ The resulting constitutional law, being derived from the authoritative text in a legitimate fashion, shares in the text's authority. Peter Lyons and Paul Carrington of the Virginia Court of Appeals explained in an 1804 opinion that "written constitutions are, like other instruments, subject to construction; and, when expounded, the exposition, after long acquiescence, becomes, as it were, part of the instrument; and can, no more, be departed from, than that."¹⁸¹ In a legal culture shaped by the common law tradition, the Republican emphasis on the text inevitably invited change.

The textualism of the principles of '98 is, I have suggested, the source of the very process of common-law development that gradually moves constitutional interpretation away from the letter of the text. But Republican textualism carried the further implication of unsettling the common law of the Constitution itself. Lyons' and Carrington's rhetoric about settled constructions being as uncontested as the text itself was hyperbolic, and on the basis of the principles of '98 Republicans who fully accepted common-law development nonetheless insisted on the logical priority of the text itself. In 1818, Henry St. George Tucker attacked the argument of some of his fellow Republicans that practice and precedent were of no authority: "Do gentlemen suppose that if, which Heaven per-

¹⁷⁹ Letter from James Madison to Spencer Roane (Sept. 2, 1819) *in* *The Mind of the Founder*, *supra* note 28, at 359, 359.

¹⁸⁰ *Id.* Unlike some Republicans, Madison accepted the authority of constitutional precedent over legislators as well as judges. See Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *in* *The Mind of the Founder*, *supra* note 28, at 390, 391-92.

¹⁸¹ *Turpin v. Lockett*, 10 Va. (6 Call) 113, 185 (1804).

mit! this confederation of states shall last for a century, we shall, throughout that period, be continually mooting Constitutional points; holding nothing as decided; admitting no construction to have been agreed upon . . . ?”¹⁸² However, Tucker conceded, the authority of the Constitution’s interpreted meaning was dependent upon, and subordinate to, the authority of the instrument itself. “I do not contend, but have explicitly disavowed the idea, that we are bound by legislative precedents against the clear meaning of the Constitution.”¹⁸³

The primacy of the text, a primacy at the heart of the principles of '98, denies final authority to anything short of the text itself, no matter how settled the precedent or plausible the interpretation. The constitutional law of precedent and practice supplies a common language of debate for a society marked by difference and disagreement,¹⁸⁴ but only the text demands common allegiance. Republican textualism provides the ultimate historical and logical basis for American constitutionalism’s capacity to reject established understandings and to chart radically new courses. The New Deal “revolution” of the late 1930s and the Warren Court’s reworking of criminal procedure in the 1960s, to take two clear examples, were dependent on the 1798 insistence that American constitutionalism is, fundamentally and not just formally, a matter of interpreting a document. The textualism of the principles of '98, to put the point another way, is the legitimating condition and rhetorical source of “constitutional moments” in which constitutional meanings shift radically even though the text of the instrument remains unchanged.¹⁸⁵ Because our constitutionalism is, in the end, about a text, constitutional meaning cannot ultimately be the captive of authorities and understandings of lesser stature.

¹⁸² 32 Annals of Cong. 1318, 1325 (1854) (statement of Rep. Henry St. George Tucker, Mar. 12, 1818).

¹⁸³ *Id.*

¹⁸⁴ See Sanford Levinson, *Constitutional Faith* 191-92 (1988).

¹⁸⁵ I disagree, therefore, with the important theoretical work of Professor Bruce Ackerman, who argues that a much more complex legal account of what he has termed “constitutional moments” is necessary to explain the legitimacy of constitutional change. See, e.g., Bruce Ackerman, 1 *We the People: Foundations* (1991).

C. The Open Constitution

Of all the themes of the principles of '98, the Republican definition of the United States Constitution as a compact probably seems the most alien to a modern reader. We look back at talk of "the states as parties" and the "nullification" of federal law across a history in which that language has been used to defend slavery, secession, and segregation: in that context compact theory has little or nothing (attractive) to say. The subsequent use of the principles of '98 by the sectional defenders of racial oppression, however, was only one possible line of development. In their origins, the principles pointed another direction as well—one which, I believe, is of contemporary value. I begin by explicitly stating what the earlier historical account attempted to make clear: compact theory, as articulated in 1798-1800, was ambiguous from the beginning. The Resolutions and the Report did *not* underwrite a clear theory of state autonomy or supremacy, as later sectional writers such as Elliot suggested. Jefferson and Madison instead presented significantly different accounts of what sort of contract the Constitution was; the Kentucky legislature approved a set of resolutions that omitted crucial language from Jefferson's 1798 draft, and its 1799 Resolutions arguably diverged in meaning from both 1798 texts; Madison's 1800 interpretation of "the states" that are parties to the compact seems deliberately unclear. Ambiguity appears to have been built into the very heart of the principles of '98.

Compact theory's ambiguity served its creators' most pressing constitutional goal—to deny finality to the actions of the federal legislature, executive, and courts, not out of settled hostility to those institutions, but to enable the Republicans' (then) minority understanding of the Constitution to obtain a public hearing despite the hostility of the federal government. On the basis of the Constitution's contractual nature, the principles of '98 endorsed a constitutional vision in which institutional power over constitutional meaning was counterbalanced by popular authority over institutions. Congress, the Virginia Report of 1800 acknowledged, "express[es] the general will" and the federal judiciary "enforces the general will," but other institutions as well as private citizens have a proper role to play in "exciting reflection" about constitu-

tional meaning.¹⁸⁶ By denying finality to the constitutional interpretations of anyone but “the parties to the constitutional compact”—the people “in their highest sovereign capacity”¹⁸⁷—compact theory legitimized continuing constitutional debate and disagreement even in the teeth of consensus among the formal institutional loci of interpretive authority.

At the time, the most noted example of the compact theory in practice (other than the Resolutions themselves) was what became known as “the Virginia Syllogism.” In defending persons charged with violations of the Sedition Act, Republican lawyers turned to the jury for vindication of the Constitution when it became clear that the federal judges would uphold the Act. William Wirt told the jurors in *United States v. Callender*¹⁸⁸ that their “right to consider the law, is a right to consider the constitution: if the law of congress under which we are indicted, be an infraction of the constitution, it has not the force of a law, and if you were to find the traverser guilty, under such an act, you would violate your oaths.”¹⁸⁹ Presiding Justice Samuel Chase ordered Wirt to sit down because “it is not competent to the jury to decide on this point,” although Chase conceded the jury’s general “right to decide the law.”¹⁹⁰ In response, Wirt stated, “Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution.”¹⁹¹ Compact theory did not entail any rejection of the courts’ power of constitutional adjudication,¹⁹² by multiplying the

¹⁸⁶ Rep. 1800, *supra* note 7, at 348.

¹⁸⁷ *Id.* at 309.

¹⁸⁸ 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709). Callender had published an attack on President Adams accusing him of “persecution” and “corruption.” *Id.* at 239-40.

¹⁸⁹ *Id.* at 253. Wirt argued that under Virginia law, “juries possess the power of considering and deciding the law as well as the fact, in every case,” and that a federal jury therefore was entitled to exercise the same power under the Rules of Decision Act. *Id.* at 252-53.

¹⁹⁰ *Id.* at 253. Chase specifically had in mind the provision of the Sedition Act that recognized the jury’s “right to determine the law . . . under the direction of the court, as in other cases,” *id.* at 255, which he interpreted to allow the jury to determine if the facts found met the legal test articulated by the judges.

¹⁹¹ *Id.*

¹⁹² Jefferson, for example, wrote in 1804 that the federal “judges, believing the [Sedition Act] constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution,” Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* Powell, *supra* note 6, at 159, 159, even though Jefferson

appropriate participants in the constitutional conversation, however, the theory prevented too rapid a closure on debatable constitutional issues.

Even more fundamentally, compact theory, whatever its (im)precise contours, was a rejection of the High Federalist reduction of popular sovereignty to a theoretical premise of republican government of no pragmatic significance.¹⁹³ The classic expression of this nationalist viewpoint was Hamilton's 1791 answer to Jefferson's invocation of the Tenth Amendment as the "foundation of the Constitution."¹⁹⁴ Hamilton responded that "[t]he main proposition here laid down [that powers not delegated are reserved], in its true signification is not to be questioned."¹⁹⁵ But the "proposition," he immediately added, was of no interpretive significance:

It is nothing more than a consequence of this republican maxim, that all government is a delegation of power. But how much is delegated in each case, is a question of fact to be made out by fair reasoning [and] construction upon the particular provisions of the constitution—taking as guides the general principles [and] general ends of government.¹⁹⁶

For adherents to the principles of '98, in contrast, the most important of the "general principles" that should guide constitutional interpretation was the Constitution's origin in the popular will and the consequent ongoing authority of the people to discuss and ultimately determine its meaning.

The ultimate purpose of the compact theory of 1798-1800 was to reaffirm "[t]he authority of constitutions over governments, and of the sovereignty of the people over constitutions."¹⁹⁷ The theory did so not so much by canonizing a particular account of federalism¹⁹⁸ as by protecting the legitimacy of disagreement on constitu-

himself thought the Act "a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image," Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* Powell, *supra* note 6, at 158, 158-59.

¹⁹³ On the nationalist view, see Sheldon Wolin's important book, *The Presence of the Past: Essays on the State and the Constitution* (1989).

¹⁹⁴ See *supra* notes 137-39 and accompanying text.

¹⁹⁵ Hamilton, *supra* note 36, at 99-100.

¹⁹⁶ *Id.* at 100.

¹⁹⁷ Rep. 1800, *supra* note 7, at 312.

¹⁹⁸ I believe this statement to be true of Jefferson as well as of Madison, even though Jefferson was at times more solicitous of state autonomy than Madison. See, e.g., Letter

tional issues. In the modern era, constitutional law attempts to secure this goal by the judicial enforcement of constitutional norms, and particularly of the First Amendment. This strategy, as valuable as it is, depends on the claim of a particular governmental institution, the courts, to final interpretive authority. By doing so the strategy treats the protection of disagreement as a negative immunity for dissent rather than as an affirmative privilege to articulate divergent views of the meaning of the constitutional text.¹⁹⁹ The principles of '98, in contrast, point to what Professor Sanford Levinson has described as a "'protestant' Constitution": "a deinstitutionalized, or at least, given the ubiquity of our life within institutional contexts, nonhierarchical, Constitution."²⁰⁰ The "sovereignty of the people over" the Constitution is trivialized by the reservation of constitutional interpretation for the courts; a modern version of the compact theory of '98 would reinvigorate "citizen review"²⁰¹ of constitutional questions, both through subnational institutions and extrainstitutionally, as a crucial feature of the constitutional ethos.²⁰² Republican constitutionalism resulted historically in a textualism that promoted judicial supremacy and restricted the role of other participants in constitutional discourse. The same constitutionalism, taken seriously today, counsels a reopening of the constitutional conversation to multiple voices.

from Thomas Jefferson to John Taylor (May 28, 1816), in *The Writings of Thomas Jefferson*, supra note 16, at 50, 52 (criticizing the federal Senate as "scarcely" republican because its members were selected by state legislatures and not "by the people directly").

¹⁹⁹ See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).

²⁰⁰ Levinson, supra note 184, at 44.

²⁰¹ *Id.* at 50.

²⁰² I should underline the point, perhaps, that a refurbished compact theory does not entail the wholesale rejection of the ordinary interpretive authority of the courts. The original articulation of the principles of '98, particularly in the Virginia Report of 1800, delicately balanced the need to respect institutional authority (both on principle and as a matter of political prudence) with the need to keep open constitutional meaning despite institutional attempts to close debate. In this and other respects, the vision of an "open Constitution" I am commending differs from the theory presented in Professor Robert A. Burt's *The Constitution in Conflict* (1992), which maintains the hierarchical superiority of federal-government interpretations while calling for equality of interpretive power among the branches of the national government.

D. Conclusion: The Political Constitution

The Federalist opponents of the principles of '98 sometimes denied that constitutional interpretation, at least the privileged interpretation of the courts, involved the exercise of "any political power whatever,"²⁰³ although Federalist interpretive practice frequently incorporated express political concerns into constitutional discussion. Part of the Federalist legacy to modern constitutionalism is this attempt to render political questions apolitical; the Federalists' contemporary heirs include the many judges and constitutional scholars who treat the principled resolution of constitutional questions by the courts as fundamentally distinct from the unpleasantly political majoritarian processes of American democracy.²⁰⁴

The understanding of interpretive authority embodied in the principles of '98 was significantly different from Federalism then or now. Republican compact theory included in the universe of interpreters state legislatures, juries, private citizens, and "the people in their highest sovereign capacity," and it anticipated a role for constitutional interpretation in activities as diverse as reaching a criminal verdict and deciding for whom to vote. The general Federalist tendency, in contrast, was to narrow the range of interpreters if not the modalities of constitutional argument.²⁰⁵

By broadening the role of the Constitution in American public life and insisting on the accessibility of constitutional argument to

²⁰³ See John Marshall, Speech Before the House of Representatives (March 7, 1800), in 4 Papers of John Marshall 82, 95 (Charles T. Cullen ed., 1984). Marshall expressed the Federalist orthodoxy on the bench in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824): "Courts are the mere instruments of the law, and can will nothing."

²⁰⁴ I elaborate on this theme in Powell, *supra* note 153.

²⁰⁵ See, e.g., *United States v. Callender*, 25 F. Cas. 239, 256 (C.C.D. Va. 1800) (No. 14,709) (concluding that the federal judiciary "is the only proper and competent authority to decide whether any statute made by congress (or any of the state legislatures) is contrary to, or in violation of, the federal constitution"); Massachusetts Resolution in Reply to Virginia (Feb. 9, 1799), reprinted in State Documents, *supra* note 19, at 18, 18 (resolving that the power to decide constitutional cases is "exclusively vested by the people" in the federal courts); Archibald Magill, Speech in the Virginia House of Delegates (Dec. 18, 1798), in Va. Report, *supra* note 46, at 71, 71 (asking "where is the department of government, except the judiciary, that can exercise this power?").

ordinary citizens,²⁰⁶ the principles of '98 implied that authority to interpret the Constitution is itself a political power. Interpretive authority therefore was subject to the same concerns about controlling power that animated the constitutional enterprise generally. Constitutionalism is, the Republicans maintained, the legal construction of a fundamental law binding the powers of government rather than a free-wheeling debate over some general theory of government and morality. However, the Republicans' fundamental suspicion of power made it impossible for them to accept the Federalist argument that reason alone—even the artificial reason of the courts—can constrain power. Constitutional law's limiting role therefore must be exercised even against those institutions that wield ordinary interpretive authority. The events of 1798-1800 involved the popular invocation of the law of the Constitution in order to effect, as Jonathan Elliot wrote, "a political revolution."²⁰⁷ The principles of '98 required the Constitution to function both as law *and* politics in order to achieve the political goals of the Republic's fundamental law.

In the contemporary context, a political retrieval of the principles of '98 would carry with it a variety of possible consequences. The Republican compact theory as this Essay interprets it provides support for the Supreme Court's flirtation with legal doctrines limiting national intrusion into subnational political processes²⁰⁸ but not for automatic deference to state or local governments.²⁰⁹ More

²⁰⁶ Republican textualism, as I have noted, led historically to the restriction of interpretation to those initiated into the mysteries of the legal profession, a result contrary to its original purpose, which was to open constitutional interpretation to popular understanding. Years later, when the potential narrowing consequences of textualism were being realized, Jefferson criticized Marshall for "trying what meaning may be squeezed out of the text or invented against it" rather than construing the Constitution "by the ordinary rules of common sense." Letter from Thomas Jefferson to William Johnson (June 12, 1823), in *The Writings of Thomas Jefferson*, supra note 16, at 145, 148. Laws, including the Constitution, "are made for men of ordinary understanding." *Id.*

²⁰⁷ Resolutions, supra note 3, at 2.

²⁰⁸ See, e.g., *New York v. United States*, 112 S. Ct. 2408 (1992) (holding a federal statute unconstitutional in part because one of the statute's provisions coerced states into administering a federal program).

²⁰⁹ While state and local governments can be the loci of open and participatory democratic politics, they are also more susceptible than the federal government to capture by oppressive political factions, as Madison argued long ago. See, e.g., *The Federalist* No. 10 (James Madison). As my friend Barry Sullivan has suggested to me in correspondence, a consistent Jeffersonian Republicanism prohibits acceptance of simplistic accounts of

importantly, a retrieval of Republican thought would require us to abandon the working assumption of most contemporary constitutional discussion, that a constitutional issue begins and ends with the question of whether the courts will uphold a given governmental action. This assumption carries with it the corollary that, within the sphere of action the courts will not invalidate, there are no constitutional issues to be debated. The teaching of the "Jeffersonian Doctrines" is that obedience to the Constitution which "We the People" have promulgated requires the people to address its meaning and its demands actively, in their roles as legislators, executive officials, jurors, voters, and citizens, not merely passively, as the recipients of authoritative judicial deliverances.²¹⁰

The Republicans of '98 were far from being simple majoritarian democrats: they emphatically did not think that the legitimacy of the Sedition Act was settled by the fact that a majority in Congress—or even a majority of the electorate—agreed for the moment that the Act was constitutional. At the same time, their belief in the openness of constitutional meaning to debate, and of constitutional debate to multiple voices, made theirs a profoundly political Constitution, a Constitution that was an intrinsic part of the political processes by which the Republic governs itself. The Republicans understood the Constitution in this (to us) almost paradoxical fashion because, although pessimists about the danger of political abuse, they were not cynics about political debate. The final lesson of the principles of '98 for modern Americans is, perhaps, that our constitutionalism requires for its health and our

constitutional authority and of claims by any institution to close constitutional discussion by institutional fiat. See Ky. Res. 1798, *supra* note 6, at 133 (professing the Republican "attachment to limited government, whether general or particular").

²¹⁰ While I believe that a revived Republican constitutionalism would likely have its most important effects in subnational settings, the principles of '98 obviously call on the Congress and the President to take seriously their obligations to interpret the Constitution in carrying out their political duties. The objections to a balanced-budget amendment that it would be judicially unenforceable, for example, are from a 1798 perspective perverse. The response of the political "realist" that we cannot seriously expect Congress and the President to take seriously a constitutional obligation they cannot be forced to obey simply assumes a cynicism that, widely enough shared, becomes a self-fulfilling prophecy. (I should note that I myself oppose a balanced-budget amendment, in part on the constitutional ground that the national government's ability to meet its obligation to provide for "the common Defense and general Welfare," U.S. Const. art. I, § 8, cl. 1, should not be impaired in such a fashion.)

safety a greater suspicion of “nonpolitical” courts, and a greater idealism in “political” democracy, than we customarily display.

